TRANSCRIPT OF RECORD.

136

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 268.

J. LEROY NICKEL AND NELLIE MILLER NICKEL, AS TRUSTEES, &c., ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE A. COLE, AS STATE CONTROLLER OF THE STATE OF NEVADA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

FILED MARCH 8, 1920.

(27,630)

(27,530)

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INDEX.

	Page.
Caption	1
Record from district court of County of Washoe	2
Bill of exceptions and statement on appeal	3
Statement	3
Petition	5
Exhibit A—Will of Henry Miller	9
Codicil	32
B—Deed of trust, April 13, 1913	34
Answer	56
Notice of motion to appoint appraisers	64
Stipulation to appoint appraisers	66
Order appointing appraisers	67
Order fixing notice	68
Order extending time	69
Petition to bring in additional parties	70
Order to bring in additional parties	72

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	Page.
Application of Rembolds for appointment of guardian *ad litem*.	75
Application of Brems for appointment of guardian *ad litem*...	76
Application of Nickel for appointment of guardian *ad litem*..	77
Order appointing guardian *ad litem*.....	78
Appearance and consent.....	79
Inheritance tax appraisement.....	81
Notice of hearing, &c.....	97
Notice of filing report and appraisement.....	102
Transcript of proceedings before inheritance tax appraiser.....	104
Report of appraiser.....	104
Notice of hearing, &c.....	106
Offers of evidence, &c.....	112
Testimony of Wm. Blattner.....	113
Testimony of E. F. Treadwell.....	120
Transcript of proceedings before inheritance tax appraiser in California	130
Stipulations	131
Testimony of Mrs. Nellie Miller Nickel.....	132
Edward Frank Campbell.....	157
David Brown.....	157
Mrs. Nellie Miller Nickel (recalled).....	158
J. Leroy Nickel.....	200
E. Frank Campbell.....	238
J. Leroy Nickel (resumed).....	239
E. Frank Campbell.....	285
James Mason.....	387
David Brown.....	405
Beatrice Sarah Nickel.....	458
Elizabeth E. Jensen.....	451
David Brown (recalled).....	476
Margaret M. Thomas.....	489
Joseph J. Lane.....	496
David Brown (recalled).....	517
State's Exhibit "F"—Power of attorney.....	545
Respondent's Exhibit 4—Certificate of stock.....	549
5—Certificate of stock.....	550
6—Certificate of stock.....	551
7—Certificate of stock.....	553
8—Certificate of stock.....	554
9—Certificate of stock.....	555
10—Statement of trustee.....	556
11—Account	557
1—Will	562
2—Codicil	562
3—Deed of trust.....	562
Petitioner's Exhibit B—Statement.....	562
Petitioner's Exhibit C—Statement.....	567
Objections to appraisement.....	570
Statement of proceedings.....	572
Opinion and order.....	575

Page.
Finding of facts 587
Conclusions of law 594
Exceptions to findings, &c 595
Notice of intention to move for new trial 603
Order denying new trial 604
Exceptions 605
Specification of particulars, &c 605
Judge's certificate to bill of exceptions 613
Judgment and decree 614
Notice of appeal 619
Undertaking on appeal 620
Assignment of errors 624
Stipulation as to record 634
Proceedings in supreme court of Nevada 635
Opinion 636
Dissenting opinion of Coleman, J 649
Judgment, January 6, 1919 665
Order granting rehearing 667
Opinion on rehearing 668
Judgment, December 9, 1919 674
Notice of motion for writ of error 676
Petition for writ of error 677
Assignment of errors 681
Order allowing writ of error 685
Writ of error (copy) 687
Citation (copy) 690
Bond 692
Stipulation as to record 696
Clerk's certificate 698

1 No.

In the Supreme Court

OF THE

State of Nevada

GEORGE A. COLE, as State Controller of the State of Nevada,

Respondent,

2 vs.

J. LEROY NICKEL and NELLIE MILLER NICKEL, trustees, etc., et al.,

Appellants.

TRANSCRIPT ON APPEAL

from the Final Order, Judgment and Decree of the District Court of the State of Nevada, in and for the County of Washoe, and from the Order of Said Court Denying

3 **the Motion of the Respondents for a New Trial.**

Honorable R. C. STODDARD, Judge.

4 *In the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe.*

No. 12,086 Dept. No. 2

George A. Cole, as State Controller of the State of Nevada,

Petitioner,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, and made intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Remhold, Albert Alexander Remhold, Henry Gustave Remhold, David Aaron Remhold, Nathan Herman Remhold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Remhold Maas, Philip Remhold Maas, Gustave Remhold, Nancy Probasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Rofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson, First English Evangelical Lutheran Church,

Respondents.

7 BILL OF EXCEPTIONS AND STATEMENT ON APPEAL.

Be it remembered that on the 20th day of November, 1916, the petitioner filed his complaint or petition herein;

Thereafter, and on the 12th day of December, 1916, the respondents, J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees
8 under a certain deed of trust dated April 17, 1913, from Henry Miller, deceased, to said trustees, filed their answer herein;

Thereafter, and on the 18th day of January, 1917, the parties to the said proceedings entered into a stipulation for the appointment of William Blattner as inheritance tax appraiser in the said matter, and thereupon and on the 18th day of January, 1917, the court made its order appoint-
9 ing the said William Blattner inheritance tax appraiser in said matter;

Thereafter, and on the 20th day of January, 1917, the court made its order fixing the notice to be given of the hearing of said matter before said inheritance tax appraiser;

Thereafter and on the 17th day of February, 1917, said court duly made its order extending the time for making said appraisement for thirty (30) days from February 18th, 1917;

10 Thereafter and on the 19th day of March, 1917, the said petitioner filed a petition bringing in additional parties, and on said 19th day of March, 1917, said court made its order bringing in said additional parties.

On the 19th day of March, 1917, three applications were filed for the appointment of guardians ad litem for certain of the respondents, and on the said 19th day of March, 1917, the court made its order appointing a guardian ad litem for the
11 said respondents, and on the said 19th day of March, 1917, all of the said parties filed their appearance and consent to be bound by all the proceedings herein.

Thereafter and on the 19th day of March, 1917, the said inheritance tax appraiser filed herein his report and inheritance tax appraisement, together with the notice of the hearing before him, and affidavit of service thereof, notice of filing his report and appraisement, transcript of
12 proceedings before him, together with the following exhibits, to wit:

Last will and testament of Henry Miller (respondents' exhibit 1);

Codicil of last will and testament of Henry Miller, deceased (respondents' exhibit 2);

Deed of trust of Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, trustees (respondents' exhibit 3);

Transcript of proceedings before the inheritance tax appraiser in the matter of the estate of Henry Miller, deceased, in California;

List of land contracts (petitioner's exhibit "B");

Computation of tax (petitioner's exhibit "C");

Thereafter, and on the 27th day of March, 1917, the respondents filed their objections to said appraisement.

The several papers and documents above referred to are in the words and figures following, to wit:

In the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe.

George A. Cole, as State Controller of the State of Nevada,

Petitioner,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, and made intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased,

Respondent.

PETITION.

Comes now the petitioner above named by his attorneys Geo. B. Thatcher, attorney general,

16 and E. F. Lansford, district attorney, and respectfully petition and show the court as follows:

That Henry Miller, a resident of the City and County of San Francisco, State of California, died on or about the ..... day of ....., 1916. That said Henry Miller, deceased, left a last will and testament under and by virtue of which the defendants Nellie Miller Nickel and J. Leroy Nickel were appointed trustees, given
17 the possession of the whole of said estate of Henry Miller, deceased, and instructed and empowered to carry out the terms and conditions of said last will and testament of Henry Miller, deceased, a full, true and correct copy of said last will and testament being attached hereto, marked exhibit A and make a part of this petition.

Petitioner further alleges that on or about
18 the 17th day of April, 1913, the deceased, Henry Miller, made, executed and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel as trustees. That said deed of trust was made without valuable or adequate consideration in contemplation of the death of the grantor Henry Miller, and intended to take effect, in possession or enjoyment at or after such death, a full, true and correct copy of said deed of trust being attached hereto, marked exhibit B, and made a part hereof.

That under and by virtue of said deed of trust aforesaid, and under and by virtue of said last will and testament aforesaid said Henry Miller, deceased, left to said trustees all of the shares of the capital stock of the Miller & Lux, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Nevada, all shares of the capital stock of the Las Animas & San Joaquin Land Company, Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and all of the stock of the Pacific Live Stock Company, a corporation organized and existing under and by virtue of the laws of the State of Nevada. That all of said shares of capital stock of said corporations aforesaid were and are part and parcel of the estate of Henry Miller, deceased, and pass by will, by deed of trust in contemplation of death, or intended to take effect in possession or enjoyment after death, or by statutes of inheritance of this state or of the State of California or other states. That said corporations aforesaid and each of them, as petitioner is informed and believes, own property, real and personal, in the State of Nevada, and particularly in the Counties of Washoe and Humboldt in said state.

That said estate is subject to the inheritance tax provided by the laws of the State of Nevada, and particularly by chapter 266, Statutes of

22 Nevada, 1913, entitled "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act, and for suits to quiet title against claims of lien arising hereunder." Approved March 26, 1913.

23 That the value of said estate and property within the State of Nevada, and the value of the bequests, devises, gifts and legacies thereunder exceeds the exemptions allowed by law, and that inheritance taxes are now due and payable thereon, the exact amount thereof at this time being unknown to this petitioner.

Wherefore, your petitioner prays that this court by order direct one or more of its inherit-
24 ance tax appraisers to fix the clear market value of the property of Henry Miller, deceased, subject to the payment of the inheritance tax provided by law, and further order that said appraiser or appraisers to forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the state controller and treasurer of respectively Washoe and Humboldt counties, of the time when and the place where they will

hear all persons interested in the appraisement of such estate.

GEO. B. THATCHER,
Attorney General,
EDWARD T. LUNSFORD,
District Attorney,
Attorneys for Petitioner.

EXHIBIT A.

LAST WILL AND TESTAMENT
OF
HENRY MILLER.

I, Henry Miller, of the City and County of San Francisco, State of California, do make, publish and declare this to be my last will and testament:

FIRST.

I declare that I am unmarried, my wife Sarah W. Miller having died on the 31st day of July, 1905, and that my only living descendants are my daughter, Nellie Miller Nickel, wife of J. Leroy Nickel, and her children.

SECOND.

I give, devise and bequeath all of that certain tract of land, situate in the County of Santa Clara, State of California, and more particularly described as follows, to wit:

Beginning at a point in the southwesterly line of the Las Animas Rancho 96.96 chains south-

easterly from the most westerly corner of the rancho, at one of the points of a resurvey of said rancho as shown on a map No. 7, case No. 5536 in the Superior Court of Santa Clara County, accompanying final report of referees, Henry Miller, plaintiff, vs. Massey Thomas, et al., defendants, described as a redwood stump and running thence northwesterly along the boundary between the Las Animas and Salsipuedes Rancho, a distance of 31.62 chains; thence at right angles northeasterly 31.62 chains; thence at right angles southeasterly 31.62 chains; thence at right angles southwesterly 31.62 chains, to the place of beginning, and containing one hundred (100) acres:

unto my daughter, Nellie Miller Nickel, for the term of her natural life, and upon her death the same shall vest in her children until the death of the last survivor of her children living at the time of my death, and thereupon the same shall vest absolutely in their descendants by right of representation per stirpes and not per capita, and in the absence of such descendants the same shall vest in the descendants of my sisters by right of representation.

THIRD.

I give, devise and bequeath all of that certain tract or parcel of land situate in the County of Santa Clara, State of California, and more particularly described in the fifth paragraph of this my will unto my daughter, Nellie Miller

Nickel and her husband, J. Leroy Nickel, and the survivor of them, for the period of their natural lives, and the natural life of the survivor of them, and upon the death of the survivor of them, the same shall vest in their childred until the death of the last survivor of their children living at the time of my death, and thereupon the same shall vest absolutely in their descendants by right of representation, and in the absence of such descendants the same shall vest absolutely in the descendants of my sisters by right of representation.

FOURTH.

I give, devise, and bequeath that certain lot of land situated near the Town of Gilroy, County of Santa Clara, State of California, and set forth and described as parcel numbered "III" in a certain deed from Las Animas & San Joaquin Land Company Incorporated to Henry Miller, dated March 26, 1908, unto the trustees hereinafter named, and the same shall be by said trustees and their successors in trust forever held, applied, devoted and used for the purpose of founding, erecting, maintaining and conducting thereon a charity hospital for the relief of the sick and infirm, to be known as "Las Animas Hospital".

FIFTH.

I direct my executors to cause my remains and the remains of my wife to be interred in

the parcel of land at Mount Madonna described as follows:

Beginning at an iron pipe set on the east side of a small ravine and in the line between the Las Animas Rancho and the Salsipuedes Rancho, south 53° 06′ east 17.85 chains from a Chestnut Oak 2½ feet in diameter and marked S S said tree being mentioned in the notes of the survey of the Las Animas Rancho, from said point bears a Madrone 8″ in diameter south 30° west 4½ links; thence south 36° 54′ west 2.41 chains to an iron pipe; thence south 53° 06′ 1.53½ chains to a stake; thence describing a curve having a radius of 100 feet the center of said curve being north 36° 54′ east, 100 feet from the last mentioned point; thence along said curve 263 feet to a point; thence north 36° 54′ east 0.355 chains to an iron pipe on the line between the Salsipuedes Rancho and the Las Animas Rancho; thence along said ranchos line north 56° 06′ west 2.23½ chains to the place of beginning. Containing 0.8 acres;

and for that purpose and for the purpose of erecting a tomb thereon, I give and bequeath to them the sum of twenty-five thousand dollars ($25,000). My trustees may also inter therein the remains of any of my descendants if the relatives of such descendants desire them to do so. If any balance shall remain after accomplishing these objects, the same shall go into and become a part of the residue of my estate, to

37 be held by my trustees as provided in the sixth paragraph of this will.

SIXTH.

All the rest, residue and remainder of my estate, real, personal, and mixed, of every kind and nature, and wherever situated, I give, devise, and bequeath unto my trustees hereafter named, and to their successors in trust, upon the following uses and trusts:

38 1. They shall take and hold all of said property, and shall take such steps as may be necessary to protect and preserve the same, and shall collect all money due me, and shall sell and convert sufficient thereof into cash to pay the several amounts by this will directed to be paid, and shall collect the rents, issues, and profits, thereof, and said property and the proceeds of sale thereof and the income therefrom shall be by them applied in the manner hereinafter set forth.

39 2. From the proceeds of the sale of said property they shall pay the following sums:

(a) They shall pay to Sarah E. Miller, the widow of my deceased son, Henry Miller, Jr., the sum of fifty thousand dollars ($50,000).

(b) They shall pay to my niece, Minnie Pfeiffer Sheldon, the wife of Stephen W. Sheldon, the income of the sum of thirty thousand dollars ($30,000) during her life, and upon her death the same shall go to her children, share and share alike.

40 (c) They shall pay to my niece, Sarah Long Brown, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life, and the balance remaining at her death shall go to the children of her sisters and brothers by right of representation.

(d) They shall pay to my niece, Elizabeth Long Barry, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life, and any balance remaining at her
41 death shall go to her children share and share alike, the issue of any deceased child taking the share of such child by right of representation.

(e) They shall pay to my niece, Nellie Long Whittington, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life and upon her death any balance remaining shall go to her children share and share alike, the issue of any deceased child taking the share of such child by right of rep-
42 resentation.

(f) They shall pay to my nephew, Albert Long, the sum of twenty-five thousand dollars ($25,000).

(g) They shall pay the sum of fifty (50) dollars a month to my nephew, Henry Long, during his life. Provided, however, that said monthly payment shall in no case extend beyond the lives of my said daughter and her children living at the time of my death.

They shall pay to Albert Pfeiffer, brother of Minnie Pfeiffer Sheldon, the sum of fifty (50)

43 dollars per month during his life; provided, that the last payment shall not extend beyond the life of the last survivor of my daughter and her children living at the time of my death.

(h) They shall pay to Martha Remboldt, wife of my nephew Julius Remboldt, the sum of ten thousand dollars ($10,000) to be held by her in trust for her children. She shall invest the same and collect the rents, issues, and profits thereof and apply the income thereof and such
44 part of the principal as she in her discretion deems necessary to their support, maintenance and education. Upon the death of said Martha Remboldt the same shall pass to and vest in and is hereby devised and bequeathed to said children, share and share alike.

(i) They shall pay to Minnie Elizabeth Pfeiffer Turner, daughter of my nephew, Albert Pfeiffer, the sum of ten thousand dollars ($10,000); to Henry John Pfeiffer, son of said Albert Pfeiffer,
45 the sum of ten thousand dollars ($10,000); and to Albert Pfeiffer, Jr., the sum of ten thousand dollars ($10,000).

(j) They shall pay to Gustave Remboldt Maas the sum of five thousand dollars ($5,000), and to Phillip Remboldt Maas the sum of five thousand dollars ($5,000), and in the case of the death of either the share of the deceased shall go to the survivor. Said sums shall be paid to them upon their respectively reaching the age of twenty-five years; provided, that the same

46 shall vest in them at all events at the death of my said daughter and her children living at the time of my death. I desire that my daughter, Nellie Miller Nickel, shall see that Gustave Remboldt Maas and Phillip Remboldt Maas receive an education in such branches as she shall deem to be best suited to fit them to enter upon useful vocations in life.

(k) They shall pay to Gustave Rembold, of Harney County, Oregon, the sum of five thou-
47 sand dollars ($5,000).

(l) They shall pay to Nancy Probasco the sum of ten thousand dollars ($10,000).

(m) They shall set aside in a separate fund the sum of ten thousand dollars ($10,000), and invest the same so as to derive income therefrom, and annually pay the income from the same to Anna Sibley Robinson, sister of my deceased wife. Upon her death the said sum shall go to and vest in the children of Minnie
48 Pfeiffer Sheldon, wife of Stephen W. Sheldon.

(n) They shall pay to Nancy Probasco, the daughter of Alzada Place, the sister of my wife, the sum of five thousand dollars ($5,000), and to Joseph Place, the son of said Alzada Place, the sum of five thousand dollars ($5,000). If either of said children of Alzada Place should die before receiving said sum, the share of such deceased shall go to the survivor.

(o) The shall pay to the following named employes of myself and Miller & Lux Incor-

49 porated the following sums as soon after my death as possible:

To Charles Z. Merritt, the sum of twenty-five hundred (2500) dollars;

To Edwin G. Rodolph, the sum of twenty-five hundred (2500) dollars;

To David Brown, the sum of twenty-five hundred (2500) dollars;

To John Dillon, the sum of twenty-five hundred (2500) dollars;

50 To William Mitchell, the sum of twenty-five hundred (2500) dollars;

To John Gilcrest, the sum of two thousand (2,000) dollars;

To Charles Reddy, the sum of two thousand (2,000) dollars;

To James Ogden, the sum of one thousand (1,000) dollars;

To D. A. Leonard, the sum of one thousand (1,000) dollars;

51 To D. W. Wallis, the sum of one thousand (1,000) dollars;

To E. F. Ogle, the sum of one thousand (1,000) dollars;

To Hugh T. Gower, the sum of one thousand (1,000) dollars;

To Charles Robinson, the sum of one thousand (1,000) dollars;

To Edwin M. Jordan, the sum of one thousand (1,000) dollars;

To Peter Arbios, the sum of five hundred (500) dollars;

52 To Henry Bader, the sum of five hundred (500) dollars;

To Mrs. Henry Bader, the sum of five hundred (500) dollars;

To H. C. Safstrom, the sum of five hundred (500) dollars;

To Cyrus B. Swift, the sum of five hundred (500) dollars;

To Benjamin Miller, the sum of three hundred (300) dollars;

53 To Gus A. Lastine, the sum of three hundred (300) dollars;

To Henry Pfeiffer, the sum of three hundred (300) dollars;

To Mrs. Emil Marquardt, the sum of two hundred and fifty (250) dollars;

To Nacisio Castro, the sum of two hundred and fifty (250) dollars;

To J. Rock Tofalo, the sum of two hundred and fifty (250) dollars;

54 To Jesus Lopez, the sum of two hundred and fifty (250) dollars;

To Louis Gonzales, the sum of two hundred (200) dollars;

To Mary Taylor, the sum of two hundred (200) dollars;

To William Beddell, the sum of two hundred (200) dollars;

To the following named stenographers in the office of Miller & Lux Incorporated the following amounts, to wit: to Miss Thomas, five hundred

55 (500) dollars; to Miss Deeney, two hundred and fifty (250) dollars, and to Miss Wilson, two hundred and fifty (250) dollars.

If any of the above named persons be not employed by me or Miller & Lux Incorporated at the time of my death, the legacy by this subdivision of my will given to him shall lapse.

I trust to my said daughter to see that Pachuca Higuerra, of New Columbia Ranch, shall have a home for the remainder of his life.

56 (p) They shall pay to Mr. and Mrs. Richard Brem the sum of five thousand dollars ($5,000), to be held, used and applied by them to giving a high school education to their three children, and to Dorothy Otto, of Gilroy, California, the sum of one thousand dollars ($1,000).

(q) They shall pay to the trustees of the San Francisco Home for Incurables the sum of ten thousand dollars ($10,000).

(r) They shall set aside in a separate fund the sum of fifteen thousand dollars ($15,000),
57 and invest the same so as to derive income therefrom and apply the income from the same to the poor of Gilroy at Christmas time.

(s) They shall pay to the trustees of the First English Evangelical Lutheran Church of San Francisco the sum of five thousand dollars ($5,000), for the use of said church.

(t) They shall set aside the sum of twenty-five thousand dollars ($25,000) in a separate fund and invest the same so as to derive income there-

58 from, and annually pay the income of the same to some charitable institution of the City of Brockenheim, in the Kingdom of Wurtemburg, Germany, my birthplace, to be selected by my trustees, to be by it distributed annually at Christmas to the poor and orphans of said city generally. Said income shall be paid to the institution so selected by my trustees on the condition that the institution so selected shall keep in good order and repair forever the cemetery
59 lot wherein my father, mother, and grandmother lie buried, and the monuments and other improvements thereon,—said lot being the one which was conveyed to me for the purpose by the proper authorities of said city. My said trustees may at any time, in their discretion, pay over to the institution so selected the whole of said fund, and thereafter said institution shall distribute the income thereof annually for the relief of the poor and orphans of said city, subject to the con-
60 dition aforesaid.

(u) They shall set aside in a separate fund the sum of fifty thousand dollars ($50,000), to be known as the San Francisco Charities Fund, and shall invest the same so as to derive income therefrom, and shall apply the same in the manner set forth in paragraphs three (3) and four (4) of this part of this will.

(v) They shall set aside in a separate fund the sum of three hundred thousand dollars ($300,000), to be known as the Las Animas

61 Hospital Fund, and invest the same so as to derive income therefrom, and shall apply the same in the manner set forth in paragraph three (3) and four (4) of this part of this will.

(w) They shall set aside in a separate fund the sum of five hundred thousand dollars ($500,000), to be known as the Medical Research Fund, and invest the same so as to derive income therefrom, and shall apply the same in the manner set forth in paragraphs three (3)
62 and four (4) of this part of this will.

3. All of the income from the property devised and bequeathed by this the sixth paragraph of this my will, except the income from the sums mentioned in subdivisions (a) to (t), both inclusive, but including the income of the funds mentioned in subdivisions (u), (v), and (w), from the time of my death shall be paid to my daughter, Nellie Miller Nickel, and her husband, J. Leroy Nickel, share and share
63 alike during their natural lives, and to the survivor of them during the natural life of such survivor.

Upon the death of the said Nellie Miller Nickel and the said J. Leroy Nickel, the said San Francisco Charities Fund shall be by said trustees applied and devoted to the purposes set forth in the next paragraph of this will, and the income from the balance of said property shall be paid equally to the children of the said Nellie Miller Nickel and J. Leroy Nickel and the

64 issue of any deceased child born in lawful wedlock, per stirpes, during the lives of such of said children as are living at the time of my death. Provided, however, that the share hereby directed to be paid to the children of the said Nellie Miller Nickel and J. Leroy Nickel shall be paid to them personally, and not to another, and the same shall never be transferred or hypothecated by them, nor shall the same ever become subject to the claims of creditors of said
65 children, or any of them; and if at any time by reason of any assignment, bankruptcy, insolvency, attachment, or other means, the share of any of said children should become subject to the claims of any third person, the share of such child shall cease and terminate, and shall be paid to the other of said children, and their issue, as hereinafter provided; and provided further that the provision herein made for the sons of the said Nellie Miller Nickel and J. Leroy Nickel
66 is made on the express condition that before the same, or any part thereof, is paid to them they shall be sober and industrious, and shall have entered upon some useful and honorable business or calling, and if at any time, either before or after said income is first paid to said sons, any of them prove lacking in these qualities, said trustees shall withhold said share from such son until such time as he has satisfied this condition, and in the meantime the share of said son shall be paid to the other of said children and their

67 issue, as hereinafter provided. During any period while said income is being withheld from any of said children for the reasons last above mentioned said trustees shall pay to such child for his support and maintenance the sum of two hundred and fifty dollars ($250) per month. Upon the death of any of said children leaving issue born in lawful wedlock them surviving, the share of said child shall be paid to such issue, but if such child leave no lawful issue, the share
68 of said child shall go to the other of said children and issue of any deceased child per stirpes and not per capita.

Upon the death of the said Nellie Miller Nickel and J. Leroy Nickel, and all of their children living at the time of my death, all of said Medical Research Fund and said Las Animas Hospital Fund shall be by said trustees applied and devoted to the purposes set forth in the next subdivision of this will, and all the rest, residue and remainder of said property remaining after
69 the payment and application of the sums directed by this will to be paid and applied shall pass to, vest in, and is hereby devised and bequeathed to the descendants born in lawful wedlock of the said Nellie Miller Nickel and J. Leroy Nickel, per stirpes and not per capita, absolutely and free of all trusts, and if they leave no descendants them surviving, then one-quarter of the same shall pass to, vest in, and is hereby devised and bequeathed to the descendants of my sisters by right of representation, absolutely and free

of all trusts, and the balance thereof shall be by said trustees held and the rents, issues and profits thereof applied and devoted to the support and assistance of such charitable institutions in the State of California as said trustees deem proper, and particularly to the support and assistance of charitable schools and institutions devoted to the practical education of boys and girls in mechanical, agricultural and domestic pursuits without regard to creed. The true intent and meaning of this provision being that said trust so far as it is for the benefit of said Nellie Miller Nickel and J. Leroy Nickel and their descendants shall absolutely cease and terminate upon the death of said Nellie Miller Nickel and J. Leroy Nickel, and of their children living at the time of my death, and that thereupon the said Medical Research Fund and said Las Animas Hospital Fund, and upon the death of said Nellie Miller Nickel and said J. Leroy Nickel said San Francisco Charities Fund, shall be by said trustees held solely on the trusts set forth in the next paragraph of this will, and that the remainder of said property shall vest in the descendants of said children, absolutely and free of all trusts, or if they leave no descendants then one-quarter of the remainder of said property shall vest in the descendants of my said sisters, absolutely and free of all trusts, and the balance thereof held by said trustees and the rents, issues and profits thereof applied and

73 devoted to the support and assistance of such charitable institutions in the State of California as said trustees deem proper, and particularly to the support and assistance of charitable schools and institutions devoted to the practical education of boys and girls in mechanical, agricultural and domestic pursuits, without regard to creed.

4. (a) The trusts upon which said Medical Research Fund is to be held upon the happening of the events mentioned and referred to in
74 paragraph three (3) of this part of this my will are as follows: Said trustees shall take and hold all of said property and invest and keep the same invested so as to derive income therefrom, and collect the rents, issues and profits thereof, and forever apply and devote the same to establishing, founding or supporting, in whole or in part, a hospital, or hospitals, devoted to medical research, and to that end such part thereof as they deem necessary and proper they shall turn
75 over to the Medical Department of the University of California having control of the Medical College affiliated with the said University in the City and County of San Francisco, or to the Medical Department of the Leland Stanford Junior University having control of the Medical College affiliated with said University in the City and County of San Francisco, or to both or either of them, as may seem proper to my said trustees, to be devoted to the founding and support of a hospital, or hospitals, of medical

76 research, or for the study, care, and treatment of certain diseases to be selected by my trustees, and under such name as may be appropriate. Any balance of said fund my said trustees may apply to the aid of such other hospitals of the same character, situated in the City and County of San Francisco, as my said trustees may deem proper.

(b) The trusts upon which said Las Animas Hospital Fund is to be held upon the happening
77 of the events mentioned and referred to in paragraph three (3) of this part of this my will are as follows: Said trustees shall apply and devote the same to the founding, erecting, maintaining, and conducting of the charity hospital mentioned in paragraph fourth of this will. My said trustees may, if they see fit, form or cause to be formed, a corporation under the laws of the State of California, with powers ample and sufficient to authorize it to carry out the objects
78 of this subdivision of my will, and thereupon such corporation shall become the trustee of the fund and endowment in this subdivision contained, and also of the property referred to in the fourth paragraph of this will, and shall have all the powers conferred and duties imposed upon my said trustees in relation to the same.

(c) The trusts upon which said San Francisco Charities Fund is to be held upon the death of said Nellie Miller Nickel and J. Leroy Nickel as above provided are as follows: Said trustees

shall pay said sum of fifty thousand dollars ($50,000) to such charitable institutions or organizations of the City and County of San Francisco, State of California, as my said trustees may select for the aid of the poor and orphans of said city and county. They shall ascertain what charitable institutions and organizations in said city and county are most fitted for charitable and educational work among the poor and orphans, and the said sum shall be by them paid to and divided among such of said institutions as they shall deem best fitted for said work in such manner and in such proportion as they may deem best.

SEVENTH.

Nothing in this will shall be construed to restrain the free alienation of any of my property, except the property specifically devised by this will to charity, and my said trustees may sell any of said property, except the property so specifically devised, at public or private sale, with or without notice, and on such terms as they may see fit, and the purchaser shall not be required to look to the application of the proceeds of any such sale. Whenever my said trustees are authorized to invest any of said property, they shall invest the same only in real estate, mortgages on real estate, bonds of the United States, or of some state, county, or municipal corporation within the United States, or stock or bonds of the corporations Miller &

Lux Incorporated, or Pacific Live Stock Company, or The San Joaquin & Kings River Canal & Irrigation Company Incorporated. All of the sums directed to be paid by the sixth paragraph of this will shall be paid as soon as sufficient money may be realized from the sale of said property without injury to my estate, and the same shall be paid as soon as in the judgment of my trustees it can be done without loss to my estate, but not later than ten (10) years after my death, and during the lives of my descendants living at the time of my death, and my said trustees may pay the same in such amounts and at such times as they deem most beneficial to my estate, and none of said amounts shall bear interest. Provided that at least one hundred and fifty dollars a month shall be paid on account of the legacy to my daughter-in-law, Sarah E. Miller, from the time of my death. Nothing herein shall be construed to require or permit the accumulation of the income of said property, but the entire income of said property shall at all times be applied to the purposes herein set forth. If any person to whom any sum of money is directed to be paid by this will dies before my death, such legacy shall lapse, except as otherwise expressly provided herein.

EIGHTH.

I hereby constitute and appoint J. Leroy Nickel, Nellie Miller Nickel and Frank B. Ander-

son the executors of this my will, and they shall not be required to give any bonds for the faithful discharge of their duties. They may sell at public or private sale any or all of my property, except the property by this will specifically devised, for cash or on credit, and on such terms as they may see fit, and without the order of any court.

NINTH.

I hereby name as the trustees of the several trusts created by this will J. Leroy Nickel and Nellie Miller Nickel. Said trustees, or the survivor of them, may at any time, if they see fit, appoint an additional trustee of said trusts, so that there shall thereafter be three trustees of said trusts, and said trustees may also before there is any vacancy in said trust, name and appoint trustees to act in the case of the death of both of the trustees herein named, by an instrument in writing duly executed and acknowledged by them, and may in the same manner at any time revoke such appointment before the same takes effect. In case of the death, resignation, or inability to act of any of the said trustees the remaining trustees or trustee shall immediately appoint another trustee to fill such vacancy or vacancies, and in default of such appointment the court having jurisdiction of said trust shall appoint a trustee to fill such vacancy, and thereupon such trustee shall have all the powers and be subject to all the

88 duties conferred and imposed upon said original trustees. Such appointment, if made by said trustees, shall be made by deed duly executed and acknowledged by them, or the survivor of them, and recorded in the office of the recorder of the City and County of San Francisco. My said trustees shall also appoint some person, who is a resident of the Town of Gilroy, as a joint trustee with them of the trust for the Las Animas Hospital.

89 Said trustees may sell, mortgage, hypothecate, or exchange, any of the property devised and bequeathed to them by the sixth paragraph of this will, and may invest and re-invest the proceeds of sale in other property, which shall be held upon the same trusts.

TENTH.

If any person named in this will shall directly or indirectly contest the same, or any part
90 thereof, or shall commence any contest or proceeding to have any provision therein contained held invalid, any and all gifts, devises, and bequests therein contained in favor of the person making such contest shall thereby be annulled, and the money or property given, devised, or bequeathed to such person shall vest in the same manner as upon the death of such person without lawful issue prior to my death.

91 ELEVENTH.

I declare that I have no lawful heirs except those mentioned in this will, and if any other person should in any manner establish any right to inherit any part of my estate, I declare that my failure to provide for such person is intentional.

TWELFTH.

Each and every provision of this will shall be construed separately, and if any provision in
92 this will contained, or any gift, devise, or bequest therein contained, or any part of any gift, devise, or bequest therein contained, should for any reason be held invalid, or for any reason unenforcible, the same shall not in any manner affect the remaining portion of said will, but the same shall be carried out and enforced in the same manner as if such invalid provision had not been contained therein. And if any provision of said will should be held invalid as applied to
93 real property, it shall none the less be carried out and enforced as to my personal property.

Lastly, I hereby revoke all former wills by me made.

In witness whereof, I have hereunto set my hand and seal and published this my last will and testament in the presence of the subscribing witnesses thereto, all on this 17th day of April in the year of our Lord one thousand nine hundred and thirteen.

Henry Miller (Seal)

94 The foregoing instrument, consisting of twenty (20) typewritten pages, exclusive of this page, and typewritten on one side of the page only, was on the day last above written by said testator signed, sealed, published and declared to be his last will and testament, in the presence of us, who, in his presence, and at his request, have hereunto subscribed our names as witnesses thereto.

Name	Residence
95 James Mason,	San Francisco, Cala.,
E. Frank Campbell,	San Francisco, Cal.,
Edward F. Treadwell,	San Francisco, Cal.

(Endorsed): Filed in the office of the clerk of the Superior Court in and for the City and County of San Francisco, State of California, this 19th day of October, A. D. 1916.

H. I. Mulcrevy, Clerk.

By E. B. Gilson,

Deputy Clerk.

96

Codicil of Last Will and Testament of Henry Miller.

I, Henry Miller, being of sound and disposing mind, do hereby make, publish and declare this to be a codicil to my last will and testament in the manner following, that is to say:

By my said will I appointed Frank B. Anderson, Nellie Miller Nickel and J. Leroy Nickel

executors of my said will, and Mr. Anderson desiring to be relieved from serving as such executor and having requested that he be relieved therefrom, I hereby appoint the said Nellie Miller Nickel and J. Leroy Nickel executors of said will, subject to all of the other terms and conditions thereof.

In witness whereof I have hereunto set my hand and seal at the City and County of San Francisco, State of California, this 4th day of June, 1913.

Henry Miller (Seal)

The foregoing instrument was on this _____ day of _____, 1913, signed, published and declared by Henry Miller, the above named testator, to be a codicil to his last will and testament, and he did sign, publish and declare the same to be a codicil to his last will and testament in the presence of us and each of us, and we did, at his request, and in his presence and in the presence of each other, subscribe our names as witnesses thereto.

Name	Residence
E. Frank Cambell	San Francisco
Elizabeth E. Jenesa	San Francisco

(Endorsed): Filed in the office of the clerk of the Superior Court in and for the City

and County of San Francisco, State of California, this 19th day of October, A. D. 1916.

H. I. Mulcrevy, Clerk.

By E. B. Gilson,

Deputy Clerk.

Exhibit B.

Deed of Trust.

This indenture made this 17th day of April, 1913, by and between Henry Miller, of the City and County of San Francisco, State of California, the party of the first part, and Nellie Miller Nickel and J. Leroy Nickel, as trustees, the parties of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the sum of ten (10) dollars, to him in hand paid by the parties of the second part, and other good and valuable considerations, has bargained, sold, transferred and conveyed, and by these presents does grant, bargain, sell, transfer, convey and set over unto the said parties of the second part, and their successors in trust as hereinafter provided, all the following described property, to wit:

All of the shares of the capital stock of Miller & Lux Incorporated, a corporation organized and existing under the laws of the State of Nevada; all of the shares of the capital stock of Miller & Lux (a dissolved corporation), and

103 all of the shares of the capital stock of Las Animas & San Joaquin Land Company Incorporated, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and whether the said shares of stock are standing in the name of the party of the first part on the books of said corporations or in the name of any other person, and also all the right, title, interest or estate which the party of the first part may have of, in or to the said
104 shares of stock, or any thereof.

To have and to hold the same as such trustees upon the following uses and trusts and for the following uses and purposes, that is to say:

I.

1. During the lifetime of the said party of the first part the said trustees shall receive the rents, issues and profits of said property and pay the same to the party of the first part,
105 during the term of his natural life.

II.

1. Upon and after the death of the said party of the first part the said trustees shall take and hold all of said property, and shall convert sufficient thereof into cash to pay the several amounts hereby directed to be paid, and shall collect the rents, issues and profits thereof, and said property and the proceeds of sale thereof

106 and the income therefrom shall be by them applied in the manner hereinafter set forth.

2. From the proceeds of the sale of said property said trustees shall pay the following sums:

(a) They shall pay to Sarah E. Miller, the widow of Henry Miller, Jr., deceased son of the party of the first part, the sum of fifty thousand dollars ($50,000).

(b) They shall pay to Minnie Pfeiffer Sheldon,
107 niece of the party of the first part, and wife of Stephen W. Sheldon, the income of the sum of thirty thousand dollars ($30,000) during her life, and upon her death the same shall go to her children, share and share alike.

(c) They shall pay to Sarah Long Brown, niece of the party of the first part, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life, and the balance remaining at her death shall go to the
108 children of her sisters and brothers by right of representation.

(d) They shall pay to Elizabeth Long Barry, niece of the party of the first part, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life, and any balance remaining at her death shall go to her children share and share alike, the issue of any deceased child taking the share of such child by right of representation.

109 (e) They shall pay to Nellie Long Whittington, niece of the party of the first part, the sum of twenty thousand dollars ($20,000), to be held and enjoyed by her during her life and upon her death any balance remaining shall go to her children share and share alike, the issue of any deceased child taking the share of such child by right of representation.

(f) They shall pay to Albert Long, nephew of said party of the first part, the sum of twenty-
110 five thousand dollars ($25,000).

(g) They shall pay the sum of fifty (50) dollars a month to Henry Long, nephew of said party of the first part, during his life. Provided, however, that said monthly payment shall in no case extend beyond the lives of Nellie Miller Nickel, daughter of said party of the first part, and her children living at the time of the death of the party of the first part.

They shall pay to Albert Pfeiffer, brother of
111 Minnie Pfeiffer Sheldon, the sum of fifty (50) dollars per month during his life; provided, that the last payment shall not extend beyond the life of the last survivor of the daughter of the party of the first part, Nellie Miller Nickel, and her children living at the time of the death of the party of the first part.

(h) They shall pay to Martha Remboldt, wife of Julius Remboldt, nephew of said party of the first part, the sum of ten thousand dollars ($10,000), to be held by her in trust for her

112 children. She shall invest the same and collect the rents, issues and profits thereof and apply the income thereof and such part of the principal as she in her discretion deems necessary to their support, maintenance and education. Upon the death of said Martha Remboldt, the same shall pass to and vest in said children, share and share alike.

(i) They shall pay to Minnie Elizabeth Pfeiffer Turner, daughter of Albert Pfeiffer, nephew of
113 said party of the first part, the sum of ten thousand dollars ($10,000); to Henry John Pfeiffer, son of said Albert Pfeiffer, the sum of ten thousand dollars ($10,000); and to Albert Pfeiffer, Jr., the sum of ten thousand dollars ($10,000).

(j) They shall pay to Gustave Remboldt Maas the sum of five thousand dollars ($5,000), and to Phillip Remboldt Maas the sum of five thousand dollars ($5,000), and in the case of the death of either the share of the deceased shall
114 go to the survivor. Said sums shall be paid to them upon their respectively reaching the age of twenty-five years; provided, that the same shall vest in them at all events at the death of Nellie Miller Nickel, daughter of said party of the first part, and her children living at the time of the death of the party of the first part.

(k) They shall pay to Gustave Rembold, of Harney County, Oregon, the sum of five thousand dollars ($5,000).

(l) They shall pay to Nancy Probasco, the sum of ten thousand dollars ($10,000).

115 (m) They shall set aside in a separate fund the sum of ten thousand ($10,000), and invest the same so as to derive income therefrom, and annually pay the income from the same to Anna Sibley Robinson, sister of deceased wife of said party of the first part. Upon her death the said sum shall go to and vest in the children of Minnie Pfeiffer Sheldon, wife of Stephen W. Sheldon.

(n) They shall pay to Nancy Probasco, the daughter of Alzada Place, the sister of deceased wife of said party of the first part, the sum of 116 five thousand dollars ($5,000), and to Joseph Place, the son of said Alzada Place, the sum of five thousand dollars ($5,000). If either of said children of Alzada Place should die before receiving said sum, the share of such deceased shall go to the survivor.

(o) They shall pay to the following named employes of said party of the first part and Miller & Lux Incorporated the following sums as soon after the death of said party of the first 117 part as possible:

To Charles Z. Merritt, the sum of twenty-five hundred (2500) dollars;

To Edwin G. Rodolph, the sum of twenty-five hundred (2500) dollars;

To David Brown, the sum of twenty-five hundred (2500) dollars;

To John Dillon, the sum of twenty-five hundred (2500) dollars;

To William Mitchell, the sum of twenty-five hundred (2500) dollars;

To John Gilcrest, the sum of two thousand (2,000) dollars;

To Charles Reddy, the sum of two thousand (2,000) dollars;

To James Ogden, the sum of one thousand (1,000) dollars;

To D. A. Leonard, the sum of one thousand (1,000) dollars;

To D. W. Wallis, the sum of one thousand (1,000) dollars;

To E. F. Ogle, the sum of one thousand (1,000) dollars;

To Hugh T. Gower, the sum of one thousand (1,000) dollars;

To Charles Robinson, the sum of one thousand (1,000) dollars;

To Edwin H. Jordan, the sum of one thousand (1,000) dollars;

To Peter Arbios, the sum of five hundred (500) dollars;

To Henry Bader, the sum of five hundred (500) dollars;

To Mrs. Henry Bader, the sum of five hundred (500) dollars;

To H. C. Safstrom, the sum of five hundred (500) dollars;

To Cyrus B. Swift, the sum of five hundred (500) dollars;

To Benjamin Miller, the sum of three hundred (300) dollars;

To Gus A. Lastine, the sum of three hundred (300) dollars;

121 To Henry Pfeiffer, the sum of three hundred (300) dollars;

To Mrs. Emil Marquardt, the sum of two hundred and fifty (250) dollars;

To Nacisio Castro, the sum of two hundred and fifty (250) dollars;

To J. Rock Tofalo, the sum of two hundred and fifty (250) dollars;

To Jesus Lopez, the sum of two hundred and fifty (250) dollars;

122 To Louis Gonzales, the sum of two hundred (200) dollars;

To Mary Taylor, the sum of two hundred (200) dollars;

To William Beddell, the sum of two hundred (200) dollars;

To the following named stenographers in the office of Miller & Lux Incorporated the following amounts, to wit: to Miss Thomas, five hundred (500) dollars; to Miss Deeney, two hundred and fifty (250) dollars, and to Miss Wilson, two hundred and fifty (250) dollars.

123

If any of the above named persons be not employed by said party of the first part or Miller & Lux Incorporated at the time of the death of said party of the first part, the provision by this subdivision made for him shall lapse.

(p) They shall pay to Mr. and Mrs. Richard Brem the sum of five thousand dollars ($5,000), to be held, used and applied by them to giving a high school education to their three children,

124 and to Dorothy Otto, of Gilroy, California, the sum of one thousand dollars ($1,000).

(q) They shall pay to the trustees of the San Francisco Home for Incurables the sum of ten thousand dollars ($10,000).

(r) They shall set aside in a separate fund the sum of fifteen thousand dollars ($15,000), and invest the same so as to derive income therefrom and apply the income from the same to the poor of Gilroy at Christmas time.

125 (s) They shall pay to the trustees of the First English Evangelical Lutheran Church of San Francisco the sum of five thousand dollars ($5,000), for the use of said church.

(t) They shall set aside the sum of twenty-five thousand dollars ($25,000) in a separate fund and invest the same so as to derive income therefrom, and annually pay the income of the same to some charitable institution of the City of Brockenheim, in the Kingdom of Wurtemburg,

126 Germany, the birthplace of said party of the first part, to be selected by said trustees, to be by it distributed annually at Christmas to the poor and orphans of said city generally. Said income shall be paid to the institution so selected by said trustees on the condition that the institution so selected shall keep in good order and repair forever the cemetery lot wherein lie buried the father, mother and grandmother of said party of the first part, and the monuments and other improvements thereon,—said lot being

127 the one which was conveyed to the party of the first part for the purpose by the proper authorities of said city. Said trustees may at any time, in their discretion, pay over to the institution so selected the whole of said fund, and thereafter said institution shall distribute the income thereof annually for the relief of the poor and orphans of said city, subject to the condition aforesaid.

(u) They shall set aside in a separate fund
128 the sum of fifty thousand dollars ($50,000), to be known as the San Francisco Charities Fund, and shall invest the same so as to derive income therefrom and shall apply the same in the manner set forth in paragraphs three (3) and four (4) of this part of this deed.

(v) They shall set aside in a separate fund the sum of three hundred thousand dollars ($300,000), to be known as the Las Animas Hos-
129 pital Fund, and invest the same so as to derive income therefrom, and shall apply the same in the manner set forth in paragraphs three (3) and four (4) of this part of this deed.

(w) They shall set aside in a separate fund the sum of five hundred thousand dollars ($500,000), to be known as the Medical Research Fund, and invest the same so as to derive income therefrom, and shall apply the same in the manner set forth in paragraphs three (3) and four (4) of this part of this deed.

130 3. All of the income from the said property, except the income from the sums mentioned in subdivisions (a) to (t), both inclusive, but including the income of the funds mentioned in subdivisions (u), (v), and (w), from the time of the death of said party of the first part shall be paid to the daughter of said party of the first part, Nellie Miller Nickel, and her husband, J. Leroy Nickel, share and share alike during their natural lives, and to the survivor of them during
131 the natural life of such survivor.

Upon the death of the said Nellie Miller Nickel and the said J. Leroy Nickel, the said San Francisco Charities Fund shall be by said trustees applied and devoted to the purposes set forth in the next paragraph of this deed, and the income from the balance of said property shall be paid equally to the children of the said Nellie Miller Nickel and J. Leroy Nickel and the issue of any deceased child born in lawful wedlock, per stirpes,
132 during the lives of such of said children, as are living at the time of the death of said party of the first part. Provided, however, that the share hereby directed to be paid to the children of the said Nellie Miller Nickel and J. Leroy Nickel shall be paid to them personally, and not to another, and the same shall never be transferred or hypothecated by them, nor shall the same ever become subject to the claims of creditors of said children, or any of them; and if at any time by reason of any assignment, bankruptcy, in-

solvency, attachment, or other means, the share of any of said children should become subject to the claims of any third person, the share of such child shall cease and terminate, and shall be paid to the other of said children and their issue, as hereinafter provided; and provided further that the provision herein made for the sons of the said Nellie Miller Nickel and J. Leroy Nickel is made on the express condition that before the same, or any part thereof, is paid to them they shall be sober and industrious, and shall have entered upon some useful and honorable business or calling, and if at any time, either before or after said income is first paid to said sons, any of them prove lacking in these qualities, said trustees shall withhold said share from such son until such time as he has satisfied this condition, and in the meantime the share of said son shall be paid to the other of said children and their issue, as hereinafter provided. During any period while said income is being withheld from any of said children for the reasons last above mentioned said trustees shall pay to such child for his support and maintenance the sum of two hundred and fifty (250) dollars per month. Upon the death of any of said children leaving issue born in lawful wedlock them surviving, the share of said child shall be paid to such issue, but if such child leave no lawful issue, the share of said child shall go to the other of said children and issue

of any deceased child per stirpes and not per capita.

Upon the death of the said Nellie Miller Nickel and J. Leroy Nickel, and all of their children living at the time of the death of the said party of the first part, all of said Medical Research Fund and said Las Animas Hospital Fund shall be by said trustees applied and devoted to the purposes set forth in the next subdivision of this deed, and all the rest, residue and remainder of said property remaining after the payment and application of the sums directed by this deed to be paid and applied shall pass to, vest in, and is hereby conveyed to the descendants born in lawful wedlock of the said Nellie Miller Nickel and J. Leroy Nickel, per stirpes and not per capita, absolutely and free of all trusts, and if they leave no descendants them surviving, then one-quarter of the same shall pass to, vest in, and is hereby conveyed to the descendants of the sisters of said party of the first part by right of representation, absolutely and free of all trusts, and the balance thereof shall be by said trustees held and the rents, issues and profits thereof applied and devoted to the support and assistance of such charitable institutions in the State of California as said trustees deem proper, and particularly to the support and assistance of charitable schools and institutions devoted to the practical education of boys and girls in mechanical, agricultural and domestic pursuits

without regard to creed. The true intent and meaning of this provision being that said trust so far as it is for the benefit of said Nellie Miller Nickel and J. Leroy Nickel and their descendants shall absolutely cease and terminate upon the death of said Nellie Miller Nickel and J. Leroy Nickel, and of their children living at the time of the death of said party of the first part, and that thereupon the said Medical Research Fund and said Las Animas Hospital Fund, and upon the death of said Nellie Miller Nickel and said J. Leroy Nickel said San Francisco Charities Fund, shall be by said trustees held solely on the trusts set forth in the next paragraph of this deed, and that the remainder of said property shall vest in the descendants of said children, absolutely and free of all trusts, or if they leave no descendants then one-quarter of the remainder of said property shall vest in the descendants of the sisters of said party of the first part, absolutely and free of all trusts, and the balance thereof held by said trustees and the rents, issues and profits thereof applied and devoted to the support and assistance of such charitable institutions in the State of California as said trustees deem proper, and particularly to the support and assistance of charitable schools and institutions devoted to the practical education of boys and girls in mechanical, agricultural and domestic pursuits, without regard to creed.

142 4. (a) The trusts upon which said Medical Research Fund is to be held upon the happening of the events mentioned and referred to in paragraph three (3) of this part of this deed are as follows: Said trustees shall take and hold all of said property and invest and keep the same invested so as to derive income therefrom, and collect the rents, issues and profits thereof, and forever apply and devote the same to establishing, founding or supporting, in whole or in part,
143 a hospital, or hospitals, devoted to medical research, and to that end such part thereof as they deem necessary and proper they shall turn over to the Medical Department of the University of California having control of the Medical College affiliated with the said University in the City and County of San Francisco, or to the Medical Department of the Leland Stanford Junior University having control of the Medical College affiliated with said university in the City and
144 County of San Francisco, or to both or either of them, as may seem proper to said trustees, to be devoted to the founding and support of a hospital, or hospitals, of medical research, or for the study, care, and treatment of certain diseases, to be selected by said trustees, and under such name as may be appropriate. Any balance of said fund said trustees may apply to the aid of such other hospitals of the same character, situated in the City and County of San Francisco, as said trustees may deem proper.

145 (b) The trusts upon which said Las Animas Hospital Fund is to be held upon the happening of the events mentioned and referred to in paragraph three (3) of this part of this deed are as follows: Said trustees shall apply and devote the same to the founding, erecting, maintaining, and conducting of a charity hospital at or near the City of Gilroy, State of California. Said trustees may, if they see fit, form or cause to be formed, a corporation under the laws of the
146 State of California, with powers ample and sufficient to authorize it to carry out the objects of this subdivision of this deed, and thereupon such corporation shall become the trustee of the fund and endowment in this subdivision contained, and shall have all the powers conferred and duties imposed upon said trustees in relation to the same.

(c) The trusts upon which said San Francisco Charities Fund is to be held upon the
147 death of said Nellie Miller Nickel and J. Leroy Nickel as above provided are as follows: Said trustees shall pay said sum of fifty thousand dollars ($50,000) to such charitable institutions or organizations of the City and County of San Francisco, State of California, as said trustees may select for the aid of the poor and orphans of said city and county. They shall ascertain what charitable institutions and organizations in said city and county are most fitted for charitable and educational work among the poor and

148 orphans, and the said sum shall be by them paid to and divided among such of said institutions as they shall deem best fitted for said work in such manner and in such proportion as they may deem best.

III.

Nothing herein shall be construed to restrain the free alienation of any of said property and said trustees may sell any of said property at public or private sale, with or without notice, and
149 on such terms as they may see fit. Whenever said trustees are authorized to invest any of said property, they shall invest the same only in real estate, mortgages on real estate, bonds of the United States, or of some county or municipal corporation within the United States, or stock or bonds of the corporations Miller & Lux Incorporated, Pacific Live Stock Company, or The San Joaquin & Kings River Canal & Irrigation Company Incorporated. All of the sums directed
150 to be paid by the second (II) paragraph of this deed shall be paid as soon as sufficient money may be realized from the sale of said property without injury thereto, and the same shall be paid as soon as in the judgment of said trustees it can be done without loss, but not later than ten (10) years after the death of said party of the first part and during the lives of the descendants of said party of the first part living at the time of his death, and said trustees may pay the same in such amounts and at such times as

151 may be most beneficial, and none of said amounts shall bear interest; provided, that at least one hundred and fifty (150) dollars a month shall be paid on account of the provision for the daughter-in-law of said party of the first part, Sarah E. Miller, from the time of the death of said party of the first part. Nothing herein shall be construed to require or permit the accumulation of the income of said property, but the entire income of said property shall at all times be
152 applied to the purposes herein set forth. If any person to whom any sum of money is directed to be paid dies before the death of said party of the first part, such provision shall lapse except as otherwise provided herein. If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament
153 of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provision herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein.

154 IV.

Said trustees, or the survivor of them, may at any time, if they see fit, appoint an additional trustee of said trusts, so that there shall thereafter be three trustees of said trusts, and said trustees may also before there is any vacancy said trust, name and appoint trustees to act in the case of the death of both of the trustees herein named, by an instrument in writing duly executed and acknowledged by them, and may
155 in the same manner at any time revoke such appointment before the same takes effect. In case of the death, resignation or inability to act of any of the said trustees, the remaining trustees or trustees shall immediately appoint another trustee to fill such vacancy or vacancies, and in default of such appointment the court having jurisdiction of said trust shall appoint a trustee to fill such vacancy, and thereupon such trustee shall have all the powers and be subject to all
156 the duties conferred and imposed upon said original trustees. Such appointment, if made by said trustees, shall be made by deed duly executed and acknowledged by them, or the survivor of them, and recorded in the office of the recorder of the City and County of San Francisco.

V.

Each and every provision of this deed shall be construed separately, and if any provision therein contained, or any part of any provision

157 therein contained, should for any reason be held invalid, or for any reason unenforcible, the same shall not in any manner affect the remaining portion thereof, but the same shall be carried out and enforced in the same manner as if such invalid provision had not been contained therein.

In witness whereof the party of the first part has hereunto set his hand and seal the day and year first hereinabove written.

Henry Miller (Seal)

158

State of California,
City and County of San Francisco.—ss.

On this seventeen day of April in the year one thousand nine hundred and thirteen before me, James Mason, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Henry Miller known to me to be the person described in, whose name is subscribed to, and who executed
159 the within and annexed instrument, and he acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

(Notarial Seal) James Mason,
Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire December 4th, 1915.

160 We, the undersigned trustees appointed by the foregoing deed of trust, hereby accept said trust on the terms therein set forth.

Dated, April 17, 1913.

Nellie Miller Nickel,
J. Leroy Nickel,
Trustees.

State of California,
City and County of San Francisco.—ss.

161 On this seventeenth day of April in the year one thousand nine hundred and thirteen before me, James Mason, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Nellie Miller Nickel and J. Leroy Nickel, trustees, known to me to be the persons described in, whose names are subscribed to, and who executed the within and annexed instrument, and they acknowledged to me that they executed the
162 same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year last above written.

(Notarial Seal) James Mason,
Notary Public in and for the City and County of San Francisco, State of California.

My commission will expire December 4th, 1915.

163 A true copy of the original recorded at the request of Edward F. Treadwell, Oct. 20, 1916, at 13 min. past 4 P. M.
No. R12263 Fee $6.70. 16.
Fol. 62 E. Godchaux,
County Recorder.

State of California,
City and County of San Francisco.—ss.

I, E. Godchaux, county recorder of the said city and county, do hereby certify that the an-
164 nexed is a whole, true and correct copy of an original record as will appear by reference to book 972 of deeds, N. S., page 170, now in my office, and that said copy has been compared with the original, and is a correct transcript therefrom.

Witness my hand and official seal this twenty-first day of October, A. D. 1916.

(Seal) E. Godchaux,
165 Recorder in and for the City and County of San Francisco.
Per Geo. M. Schiller,
Deputy.

(Endorsed): Petition.

Filed Nov. 20, 1916,
W. A. Fogg, Clerk,
By S. R. Tippett,
Deputy

166 [Title of Court and Cause.]

ANSWER

Now come the respondents, J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust dated April 17, 1913, from Henry Miller, deceased, to said trustees, in the above entitled proceeding, and answering the petition of George A. Cole
167 as state controller of the State of Nevada, therein, admit, allege and deny as follows, to wit:

I.

They admit that Henry Miller, a resident of the City and County of San Francisco, State of California, died on the 14th day of October, 1916, and that said Henry Miller, deceased, left a last will and testament, a copy of which is attached to the petition herein.

168

II.

They admit that on the 17th day of April, 1913, the said Henry Miller made, executed and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, as trustees, a copy of which is attached to the petition herein, but they deny that the said deed of trust was made without valuable or any consideration, or in contemplation of the death of the grantor, Henry Miller, and deny that the same was intended to take

169 effect in possession or enjoyment, or otherwise, at or after such death.

III.

They allege that under and by virtue of said deed of trust said Henry Miller on the said 17th day of April, 1913, transferred and set over unto said trustees all of the shares of the capital stock of Miller & Lux Incorporated, a corporation organized and existing under and by virtue
170 of the laws of the State of Nevada, then owned by him, to wit: one hundred nineteen thousand eight hundred thirty-nine and seventy-five one-hundredths (119,839.75) shares of the capital stock thereof, and no more, and also all shares of the capital stock of the Las Animas & San Joaquin Land Company Incorporated, a corporation organized under and by virtue of the laws of the State of Nevada, but at that time the said Las Animas & San Joaquin Land Company In-
171 corporated owned no property of any kind or character, and had been dissolved, and the said stock was of no value, and also all of the capital stock of Miller & Lux, a corporation organized under the laws of the State of California, but at that time the said corporation Miller & Lux owned no property of any kind or character, and had been dissolved, and the said stock was of no value; but they deny that by the said deed of trust the said Henry Miller conveyed or set over to said trustees all or any of the

172 capital stock of the Pacific Live Stock Company, and deny that at that time he owned any of the capital stock of said Pacific Live Stock Company. They deny that the said Pacific Live Stock Company was or is a corporation organized or existing under or by virtue of the laws of the State of Nevada, but on the contrary allege that the said Pacific Live Stock Company is a corporation organized and existing under and by virtue of the laws of the State of California, and on
173 the said 17th day of April, 1913, and at all times since that time and for many years prior to that time all of the capital stock of the said Pacific Live Stock Company was and is owned by the said corporation Miller & Lux Incorporated.

IV.

They deny that under or by virtue of said last will and testament of said Henry Miller, deceased, any of the shares of the capital stock
174 of Miller & Lux Incorporated or of Las Animas & San Joaquin Land Company Incorporated, or of the Pacific Live Stock Company were left to the said trustees, and deny that any of the said shares of stock belonged to said Henry Miller at the date of his death, and deny that the said shares, or any thereof, were or are part or parcel of the estate of Henry Miller, deceased, and deny that the same passed by his said will, or any will, or by statutes of inheritance of this state or of the State of California, or of any

175 other state or states, and deny that the same passed by any deed of trust in contemplation of death or intended to take effect in possession or enjoyment after death.

V.

They admit that the said corporation Pacific Live Stock Company at all times herein mentioned owned and still owns property, real and personal, in the State of Nevada, and particu-
176 larly in the counties of Washoe and Humboldt, in said state, but they deny that at any of the times herein mentioned the said corporations Miller & Lux Incorporated or Las Animas & San Joaquin Land Company Incorporated owned any property, real or personal, in the State of Nevada.

VI.

They deny that said estate is subject to the inheritance tax provided by the laws of the
177 State of Nevada, or by chapter 266 (Statutes of Nevada, 1913), entitled "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of laws created by this act and for suits to quiet title against claims of lien arising thereunder", approved March 26,

178 1913, or under any other law of the State of Nevada.

VII.

They admit that the value of the shares of stock referred in said complaint exceeds the exemptions allowed by law, but they deny that the bequests, devises, gifts, or legacies under said will exceed the exemptions allowed by law, and they deny that any inheritance taxes are now due or payable thereon, and deny that any
179 inheritance tax is due or payable thereon, or upon the estate and property within the State of Nevada, or elsewhere, described in the said petition.

VIII.

Further answering the said petition the said defendants allege that at the time of his death the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in said
180 petition, but on the contrary the said Henry Miller transferred and conveyed all of the said property to these defendants by the said deed of trust, on the 17th day of April, 1913, and the said trustees thereupon became and ever since have been the owners, and in the possession, and entitled to the possession of the same, and the whole thereof, and their rights thereto and therein vested upon the said 17th day of April, 1913, and prior to the date upon which the said act approved March 26th, 1913, went into ef-

181 fect; that the said act is not and was not intended to have any retroactive effect or to apply to any transfers made prior to the date upon which the same went into effect, nor to any estates or rights which vested prior to that time; that if the said act, however, be construed or held to be retroactive or to apply to a transfer made prior to said date, or to rights which vested prior to said date, then the same is to that extent unconstitutional, invalid and
182 void, for the following reasons:

(a) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

(b) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust for a public use, without just compensation, in violation of the four-
183 teenth amendment to the Constitution of the United States.

(c) That the same denies to these defendants and to the beneficiaries under the said deed of trust the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

(d) That the said act impairs the obligation of contracts, in violation of section ten of article I of the Constitution of the United States.

184 (e) That the same deprives these defendants and the beneficiaries under said trust of their property without due process of law, in violation of section 8, article I of the Constitution of the State of Nevada.

(f) That the said act takes private property, to wit: the property and rights transferred to these defendants and the beneficiaries under the said deed of trust by the said deed of trust, for a public use, without just compensation having
185 been first made or secured, in violation of section 8 of article I of the Constitution of the State of Nevada.

(g) That the said act impairs the obligation of contracts in violation of section 15 of article I of the Constitution of the State of Nevada.

(h) If the said act be further construed to provide for a property tax as distinguished from a transfer tax, then the same is not levied uni-
186 formly and equally upon all the property in said State of Nevada, and is in violation of section I of article 10 of the Constitution of the State of Nevada.

(i) That the said corporations Miller & Lux Incorporated and Las Animas & San Joaquin Land Company Incorporated were incorporated under an act entitled "An act providing a general corporation law", approved March 16th, 1903, and by the provisions of section 57 of said act it was provided that no stock issued by any

187 corporation organized under said act should be taxed by the State of Nevada when the same should be owned by non-residents of the State of Nevada, and all of the said stock in the said Miller & Lux Incorporated so transferred to these defendants was owned by the said Henry Miller, who was at all times a non-resident of the State of Nevada, and was a resident of the State of California, and the said act and the incorporation of the said corporation under the
188 same constituted a contract, and if the said stock or the transfer thereof is taxed the same constitutes an impairment of the obligation of the said contract, in violation of section 10 of article I of the Constitution of the United States, and of section 15 of article I of the Constitution of the State of Nevada.

And said defendants hereby invoke the benefit of the said provisions of the Constitution of the
189 United States and of the Constitution of Nevada, and of each and all thereof.

Wherefore said defendants pray that said petitioner take nothing by said petition, and that the same be dismissed; that it be adjudged that there is no inheritance tax due to the said petitioner or to the State of Nevada upon the property referred to in the said petition, or upon any thereof, under the act referred to therein, or under any other act whatsoever, and that

190 defendants recover their costs and have such other relief as may be meet in the premises.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Defendants.

(Endorsed): Service of the within by copy admitted Dec. 12, 1916.

GEO. B. THATCHER and
E. F. LUNSFORD,
Attorneys for Petitioner.

191 Filed this 12th day of Dec., 1916.
W. A. FOGG, Clerk,
By E. H. Beemer,
Deputy.

[Title of Court and Cause.]

NOTICE OF MOTION
TO APPOINT APPRAISERS.

To the petitioner in the above entitled action
192 and to Hon. George B. Thatcher, attorney general, attorney for petitioner.

You and each of you will please take notice that on the 12th day of January, 1917, at the hour of 10 o'clock A. M. of said day, and in the court room of the above entitled court, in the City of Reno, County of Washoe, State of Nevada, the respondents therein will move said court to appoint an appraiser or appraisers to act in said matter in accordance with the provisions of an act entitled "An act to provide

193 revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection, and to direct the disposition of its proceeds, to provide for the enforcement of laws created by this act and for suits to quiet title against claims of lien arising thereunder", approved March 26th, 1913; and in accordance with section 17 of said act.

194 Said motion will be made upon the ground that the appointment of such appraiser or appraisers is proper under the terms of the said act, and it is impossible for the said court to determine what, if any, property is subject to a tax under the said act until such appraisement is made.

Said motion will be made upon this notice and upon all the records, papers and files in the above entitled cause.

Dated, Jan. 6, 1917.

195 CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Respondents.

(Endorsed): Service of the within by copy admitted Jan'y 6, 1917.

E. F. LUNSFORD and
GEO. B. THATCHER,
Attorneys for Plaintiff.

Filed this 6th day of Jan., 1917.
W. A. FOGG, Clerk.
By E. H. Beemer,
Deputy.

196 [Title of Court and Cause.]

STIPULATION TO APPOINT APPRAISER.

It is hereby stipulated and agreed by and between the parties to the above entitled proceedings, as follows, to wit:

1. An order may be made therein appointing William Blattner, inheritance tax appraiser, to act as appraiser in the above entitled matter, and to appraise all of the property in the State of Nevada involved in said proceedings, duplicate
197 copies of his appraisement to be filed in the counties of Humboldt, Washoe and Lyon and any other counties in which said property is situated.

2. Upon the completion of the said appraisement the said appraiser shall make a return thereof to this court, together with his computation of the inheritance tax, if any is found to be due thereon, together with such other facts as may be necessary under the provision of the
198 act fixing said inheritance tax.

Dated, January_____, 1917.

GEO. B. THATCHER,
Attorney for Petitioners.

E. F. LUNSFORD,
District Attorney.

CHENEY, DOWNER, PRICE & HAWKINS,

EDWARD F. TREADWELL,
Attorneys for Respondents.

199 (Endorsed): Filed this 18th day of Jan., 1917.

W. A. Fogg, Clerk.
By E. H. Beemer,
Deputy.

[Title of Court and Cause.]

ORDER
APPOINTING APPRAISER.

200 Upon stipulation of the parties hereto, duly filed, it is ordered by the court as follows:

That William Blattner be appointed and he is hereby appointed inheritance tax appraiser in the above entitled proceeding, to appraise all the property in the State of Nevada, involved in said proceeding, and file duplicate copies of his appraisement in the Counties of Humboldt, Washoe and Lyon, and any other counties in which said property may be situated.

201 Upon the completion of said appraisement, the said appraiser shall make a return thereof to this court, together with his computation of the inheritance tax, if any is found to be due thereon, together with such other facts as may be necessary under the provisions of the act fixing said inheritance tax.

Dated, January 18th, 1917.

R. C. STODDARD,
District Judge.

(Endorsed): Filed this 18th day of Jan., 1917.
W. A. Fogg, Clerk.
By E. H. Beemer, Deputy.

[Title of Court and Cause.]

ORDER FIXING NOTICE.

Good cause appearing therefor it is hereby ordered that William Blattner, duly appointed inheritance tax appraiser in the above entitled matter, be and he hereby is ordered and directed to give notice of the time and place at which the said appraiser will fix the clear market value of all of the property in the State of Nevada involved in said proceeding, and at which time and place he will hear all persons interested in the appraisement in said matter, to the following named persons, to wit: Hon. George A. Cole, state controller of the State of Nevada, petitioner, and Hon. George B. Thatcher, attorney general of the State of Nevada, Hon. E. F. Lunsford, district attorney of the County of Washoe, State of Nevada, attorneys for petitioner; treasurer of the County of Washoe, State of Nevada; treasurer of the County of Humboldt, State of Nevada; treasurer of the County of Lyon, State of Nevada; treasurer of County of Ormsby, State of Nevada; J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and

J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust dated April 17th, 1913, from Henry Miller, deceased, to said trustees, respondents, and Messrs. Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, Esq., attorneys for respondents, all in accordance with the provisions of the act of the Legislature of the State of Nevada entitled "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act, and for suits to quiet title against claims of lien arising hereunder."

Dated, January 20th, 1917.

R. C. Stoddard,

District Judge.

(Endorsed): Filed this 20 day of Jan., 1917.

W. A. Fogg, Clerk.

By E. H. Beemer, Deputy.

[Title of Court and Cause.]

Order Extending Time for Making Appraisement.

It appearing to the court that the inheritance tax appraiser appointed by the court will be unable to make and complete the appraisement

208 within thirty days from the order heretofore made.

Now, therefore, it is hereby ordered that the time within which the said appraiser may complete said appraisement and made his return to this court be, and the same hereby is extended for thirty days from and after the 18th day of February, 1917.

Dated, February 17th, 1917.

209 R. C. Stoddard,
District Judge.

(Endorsed): Filed this 17th day of Feb., 1917.

E. H. Beemer, Clerk.

[Title of Court and Cause.]

Petition for Bringing in Additional
210 Parties Defendant.

Comes now the petitioner above named, by his attorneys Geo. B. Thatcher, attorney general, and E. F. Lansford, district attorney of the County of Washoe, and respectfully shows to the court as follows:

That a complete determination of the controversy involved in said petition and of the matters and things therein stated and set forth cannot be had without the presence of other

211 parties, to wit the following named parties, individuals, associations and corporations.

Nellie Miller Nickel, individually
J. Leroy Nickel, individually
George W. Nickel
Beatrice Sarah Nickel
J. Leroy Nickel, Jr.
Sarah Miller Nickel
Sarah E. Miller
Minnie Pfeiffer Sheldon
Josephine Sheldon
212 Kickham
Jeremiah Sheldon
Mildred Sheldon Cornett
Sarah Long Brown
Mary Long
Raymond Long
Elizabeth Long Barry
Frank Barry
George Barry
Hazel Barry
Nellie Long Whittington
Sarah Ethel Johnson
Goldie Whittington
213 Henry Long
Albert Pfeiffer
Martha Rembold
Albert Alexander Rembold
Henry Gustave Rembold
David Aaron Rembold
Nathan Herman Rembold
Gus A. Lastine
Nacisio Castro
Jesus Lopez
William Bedell
M. V. Deeney
San Francisco Home for Incurables
Minnie Elizabeth Pfeiffer Turner
Henry John Pfeiffer
Albert Pfeiffer, Jr.
Gustave Rembold Maas
Phillip Rembold Maas
Gustave Rembold
Nancy Probasco
Anna Sibley Robinson
Joseph Place
Dorothy Otto
Richard Brem
Christina Fisher Brem
Henry Brem
George Brem
Richard Brem, Jr.
Charles Z. Merritt
Edwin G. Rodolph
David Brown
John Dillon
William Mitchell
Charles Reddy
E. F. Ogle
Hugh T. Gower
Edwin M. Jordan
Henry Bader
Mrs. Henry Bader
H. C. Safstrom
Benjamin Miller
Henry Pfeiffer
J. Rock Tofalo
Louis Gonzales
M. M. Thomas
M. C. Wilson
First English Evangelical Lutheran Church.

214 And the petitioner prays the court that an order be entered making said above mentioned parties, associations and corporations parties defendant to said proceedings, and that the court order them to be brought in, and that the petitioner be ordered by the court to serve a copy of the summons in this proceeding and the order above mentioned on each of said parties, associations and corporations, unless said parties, associations and corporations shall appear individ-
215 ually or through their attorney, in which case service of process may be dispensed with.

GEO. B. THATCHER,
Attorney General of the State of Nevada.
E. F. LUNSFORD,
District Attorney of the County of Washoe, State of Nevada.
Attorneys for Petitioner.

(Endorsed): Filed this 19th day of March, 1917.

216 E. H. BREMER, Clerk.
By S. C. Foster, Deputy.

[Title of Court and Cause.]

ORDER BRINGING IN ADDITIONAL PARTIES.

On this day the matter of the application of the petitioner to bring in additional parties defendant in the above entitled proceeding came on for hearing before the court, and the court

217 being satisfied that a complete determination of the controversy herein cannot be had without the presence of said other parties, and the petitioner and the respondents herein appearing by their attorneys, and stipulating and consenting thereto,

It is ordered by the court that the following named parties, associations, and corporations be made parties defendant in this proceeding, to wit:

218

Nellie Miller Nickel, individually
J. Leroy Nickel, individually
George W. Nickel
Beatrice Sarah Nickel
J. Leroy Nickel, Jr.
Sarah Miller Nickel
Sarah E. Miller
Minnie Pfeiffer Sheldon
Josephine Sheldon Kickham
Jeremiah Sheldon

219

Mildred Sheldon Cornett
Sarah Long Brown
Mary Long
Raymond Long
Elizabeth Long Barry
Frank Barry
George Barry
Hazel Barry
Nellie Long Whittington
Sarah Ethel Johnson
Goldie Whittington
Henry Long
Albert Pfeiffer
Martha Rembold
Minnie Elizabeth Pfeiffer Turner
Henry John Pfeiffer
Albert Pfeiffer, Jr.
Gustave Rembold Maas
Phillip Rembold Maas
Gustave Rembold
Nancy Probasco
Anna Sibley Robinson
Joseph Place
Dorothy Otto
Richard Brem
Christina Fisher Brem
Henry Brem
George Brem
Richard Brem, Jr.
Charles Z. Merritt
Edwin G. Rodolph
David Brown
John Dillon
William Mitchell
Charles Reddy
E. F. Ogle
Hugh T. Gower
Edwin M. Jordan
Henry Bader
Mrs. Henry Bader

220

Albert Alexander Rembold	H. C. Safstrom
Henry Gustave Rembold	Benjamin Miller
David Aaron Rembold	Henry Pfeiffer
Nathan Herman Rembold	J. Rock Tofalo
Gus A. Lastine	Louis Gonzales
Nacisio Castro	M. M. Thomas
Jesus Lopez	M. C. Wilson
William Bedell	
M. V. Deeney	
San Francisco Home for Incurables	First English Evangelical Lutheran Church.

221

That the petitioner be required to serve a copy of the summons in this proceeding and a copy of this order upon each of the parties, associations and corporations hereinbefore mentioned, unless said parties, associations and corporations shall voluntarily appear in person or through their attorney, in which case the service of said summons and a copy of this order shall be dispensed with.

222

Done in open court this 19th day of March, 1917.

R. C. Stoddard,
District Judge.

(Endorsed): Filed this 19th day of March, 1917.

C. H. Beemer, Clerk.
By S. C. Foster, Deputy.

223 [Title of Court and Cause.]

APPLICATION OF ALBERT ALEXANDER REMBOLD ET AL. FOR APPOINTMENT OF GUARDIAN AD LITEM.

To the honorable the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe:

Comes now Albert Alexander Rembold, Henry Gustave Rembold and David Aaron Rembold,
224 minors, over the age of fourteen years, and Nathan Herman Rembold, a minor, of the age of thirteen years, and pray the above entitled court to appoint Edward F. Treadwell guardian ad litem for the said Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold and Nathan Herman Rembold, to represent them in the above entitled action.

Dated, March 16, 1917.

225 ALBERT ALEXANDER REMBOLD.
HENRY GUSTAVE REMBOLD.
DAVID AARON REMBOLD.
NATHAN HERMAN REMBOLD.

(Endorsed): Filed this 19th day of Mar., 1917.

E. H. BEEMER, Clerk.
By S. C. Foster, Deputy.

226 [Title of Court and Cause.]

APPLICATION OF GEORGE BEEM ET AL. FOR APPOINTMENT OF GUARDIAN AD LITEM.

Come now the defendants George Brem and Richard Brem, and respectfully show to this court that they are minors over the age of fourteen years, and they have no general guardian to represent them in the above entitled proceeding, and that it is necessary that a guardian
227 ad litem be appointed to represent them therein; that Edward F. Treadwell is attorney for the parents of said petitioners in the above entitled proceeding, and it is proper that he be appointed guardian ad litem to represent your petitioners.

Wherefore, petitioners pray that an order be made appointing Edward F. Treadwell guardian ad litem of your petitioners to represent them in said proceeding.

GEO. BREM.

228 RICHARD BEEM.

(Endorsed): Filed this 19th day of March, 1917.

E. H. BEEMER, Clerk.

By S. C. Foster, Deputy.

229 [Title of Court and Cause.]

APPLICATION FOR APPOINTMENT OF GUARDIAN AD LITEM FOR SARAH MILLER NICKEL AND HERMAN REMBOLD.

Now comes Edward F. Treadwell and respectfully shows to the court that Sarah Miller Nickel is a minor of the age of one year or thereabouts, and that petitioner is attorney for the mother and father of said minor, and represents them in this proceeding, and is a friend of said
230 minor, and makes this application as a friend of said minor, that the said minor has no general guardian, and it is necessary that a guardian ad litem be appointed to represent the said minor.

That the defendant Nathan Herman Rembold is a minor under the age of fourteen years, to wit, of the age of thirteen years, and the said minor has no general guardian, and it is necessary that a guardian ad litem be appointed to
231 represent him in the above entitled proceeding; that petitioner is attorney for the mother of said minor in this proceeding, and is a friend of said minor, and makes this application for the appointment of a guardian ad litem of said minor as a friend of said minor.

Wherefore, your petitioner prays that the court appoint a satisfactory and proper person as guardian ad litem of said minors.

EDWARD F. TREADWELL,

Petitioner.

232 (Endorsed): Filed this 19th day of Mar., 1917.

E. H. Beemer, Clerk.
By S. C. Foster, Deputy.

[Title of Court and Cause.]

Order Appointing Guardian ad Litem.

It appearing to the court that the defendant,
233 Sarah Miller Nickel is a minor under the age of fourteen years, that defendants Albert Alexander Rembold, Henry Gustav Rembold, David Aaron Rembold, and George Brem and Richard Brem, are minors over the age of fourteen years, and that defendant Nathan Herman Rembold is a minor under the age of fourteen years, and it appearing to this court that the said defendants Albert Alexander Rembold, Henry Gustav Rembold, Davis Aaron Rembold, and George
234 Brem and Richard Brem have applied to this court for the appointment of a guardian ad litem to represent them in said proceeding, and Edward F. Treadwell, a friend of defendants Sarah Miller Nickel and Nathan Herman Rembold, having applied to this court for the appointment of a guardian ad litem to represent the said minors, and good cause appearing therefor,

It is ordered that Edward F. Treadwell be, and he hereby is appointed guardian ad litem to

235 represent the aforesaid minors in the above entitled proceeding.

Dated, March 19, 1917.

R. C. Stoddard,
District Judge.

(Endorsed): Filed this 19th day of Mar., 1917.

E. H. Beemer, Clerk.
By S. C. Foster, Deputy.

236

[Title of Court and Cause.]

Appearance and Consent.

Comes now, Edward F. Treadwell, attorney at law, and enters his appearance for the following named parties, associations and corporations, by order of the court made parties defendant to the above entitled proceeding:

Nellie Miller Nickel, individually
237 J. Leroy Nickel, individually
George W. Nickel
Beatrice Sarah Nickel
J. Leroy Nickel, Jr.
Sarah Miller Nickel, by Edward F. Treadwell, Guardian ad litem
Sarah E. Miller
Minnie Pfeiffer Sheldon
Josephine Sheldon Kickham
Jeremiah Sheldon,
Minnie Elizabeth Pfeiffer Turner
Henry John Pfeiffer
Albert Pfeiffer, Jr.
Gustave Rembold Maas
Phillip Rembold Maas
Gustave Rembold
Nancy Probasco
Anna Sibley Robinson
Joseph Place
Dorothy Otto
Richard Brem
Christina Fisher Brem
Henry Brem
George Brem, by Edward

238 Mildred Sheldon Cornett
Sarah Long Brown
Mary Long, by Albert White Furlong, guardian
Raymond Long, by Albert White Furlong, guardian
Elizabeth Long Barry
Frank Barry
George Barry
Hazel Barry
Nellie Long Whittington
Sarah Ethel Johnson
239 Goldie Whittington
Henry Long
Albert Pfeiffer
Martha Rembold
Albert Alexander Rembold, by Edward F. Treadwell, guardian ad litem
Henry Gustave Rembold, by Edward F. Treadwell, guardian ad litem
David Aaron Rembold, by EdwardF. Treadwell,
240 guardian ad litem
Nathan Herman Rembold, by Edward F. Treadwell, guardian ad litem
Gus A. Lastine
Nacisio Castro
Jesus Lopez
William Bedell
M. V. Deeney
San Francisco Home for Incurables
F. Treadwell, guardian ad litem
Richard Brem, Jr., by Edward F. Treadwell, guardian ad litem
Charles Z. Merritt
Edwin G. Rodolph
David Brown
John Dillon
William Mitchell
Charles Reddy
E. F. Ogle
Hugh T. Gower
Edwin M. Jordan
Henry Bader
Mrs Henry Bader
H. C. Safstrom
Benjamin Miller
Henry Pfeiffer
J. Rock Tofalo
Louis Gonzales
M. M. Thomas
M. C. Wilson
First English Evangelical Lutheran Church.

And the said Edward F. Treadwell, attorney at law, for and on behalf of said parties, associ-

241 ations and corporations, and each and every of them, does consent and stipulate that the proceedings which have already been had herein shall and may bind each of said parties, associations and corporations in the same manner as if they and each of them had been made parties to this action originally.

Dated, Reno, Navada, March 19, 1917.

EDWARD F. TREADWELL,
Attorney for Defendant.

242

CHENEY, DOWNER, PRICE & HAWKINS,
Of Counsel.

(Endorsed): Filed this 19th day of Mar., 1917.

E. H. BEEMER, Clerk.
By S. C. Foster, Deputy.

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243 [Title of Court and Cause.]

INHERITANCE TAX APPRAISEMENT IN RE ESTATE OF HENRY MILLER, DECEASED.

To the honorable the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe:

In pursuance of a stipulation entered into on the 18th day of January, A. D. 1917, by and between the plaintiff and the defendants in the

244 above entitled action, and by virtue of an order of the court made and entered on the 18th day of January, A. D. 1917, wherein I was appointed inheritance tax appraiser in the above entitled proceeding, to appraise all the property in the State of Nevada, involved in said proceeding, I herewith submit my appraisement of all property involved in this proceeding, and situated in the State of Nevada:

245 Humboldt County.

I find the real property situated in the County of Humboldt, State of Nevada, to consist of about 50,032.09 acres of grazing land, and twenty ranches, commonly known and designated as follows, to wit:

Leonard Creek, Clark, Battle Creek, Piute Meadows, Soldier Meadows, Mud Meadows, Virgin Valley, Alder Creek, Boggs Hot Springs,
246 Knott Creek, Crane Creek, Cove Meadows, Big Creek, Bilk Creek, Quinn River, Hog John, McKinney Camp, King's River Basin and Humboldt River Ranch; and I hereby appraise each ranch separately, classifying the lands as alfalfa, grain, wild hay, irrigated pasture and garden, fixing the full cash value on each separate class and giving the total valuation of land and improvements on each ranch.

247 Leonard Creek Ranch.

Township 41 N., range 28 E., &
Township 42 N., range 28 E., M. D. B. & M.

Alfalfa land, 116 acres at $40.00 per acre	$ 4640.00
Grain land, 45 acres at $30.00 per acre	1350.00
Orchard and garden, 11.5 acres at $50.00 per acre	575.00
Improvements	600.00
Total	$ 7165.00

248 Clark Ranch.

Township 41 N., range 28 E., M. D. B. & M.

Meadow land, 86 acres at $30.00 per acre	$ 2580.00
Alfalfa land, 12 acres at $40.00 per acre	480.00
Irrigated pasture, 37.5 acres at $12.00 per acre	450.00
Improvements	50.00
	$ 3560.00

Battle Creek Ranch.

Township 40 N., range 27 E., M. D. B. & M.

249 Alfalfa land, 76 acres at $40.00 per acre	$ 3040.00
Grain land, 29 acres at $30.00 per acre	870.00
New land, 45 acres at $20.00 per acre	900.00
Improvements	300.00
	$ 5110.00

Piute Meadows Ranch.

Township 39 N., range 27 E., M. D. B. & M.

Alfalfa land, 20.5 acres at $40.00 per acre	$ 820.00
Meadow land, 197. acres at $30.00 per acre	5910.00

Irrigated pasture, 32 acres at $12.00 per acre	384.00
Improvements	800.00
Total	$ 7914.00

Soldier Meadows Ranch.

Township 40 N., range 25 E., M. D. B. & M.

Alfalfa land, 54 acres at $40.00 per acre	$ 2160.00
Meadow land, 71 acres at $30.00 per acre	2130.00
Irrigated pasture, 12 acres at $10.00 per acre	120.00
Orchard and garden, 1.25 acres at $40.00 per acre	50.00
Cultivated land, 19.50 acres at $30.00 per acre	50.00
Improvements	800.00
Total	$ 5845.00

Mud Meadows Ranch.

Township 40 N., range 24 E., &
" 40 N., " 25 E., M. D. B. & M.

Meadow land, 237.75 acres at $20.00 per acre	$ 4755.00
Alfalfa land, 70.50 acres at $30.00 per acre	2115.00
Irrigated pasture, 60 acres at $10.00 per acre	600.00
Total	$ 7470.00

McKinney Camp.

Township 46, N., range 25 E., M. D. B. & M.

Meadow land, 25.50 acres, at $20.00 per acre	$ 510.00
Irrigated pasture, 20.75 acres, at $10.00 per acre	207.50
Total	$ 717.50

253 Virgin Valley Ranch.

Township 45 N., range 26 E., M. D. B. & M.

Meadow land, 174 acres, at $25.00 per acre	$ 4350.00
Irrigated pasture, 200 acres, at $10.00 per acre	2000.00
(Note: Map shows no irrigated pasture.)	
Improvements	600.00
Total	$ 6950.00

Alder Creek Ranch.

254 Township 44 N., range 28 E., &
" 45 N., " 28 E., M. D. B. & M.

Meadow land, 300 acres, at $30.00 per acre	$ 9000.00
Grain land, 140 " " 30.00 " "	4200.00
New land, 25 " " 25.00 " "	725.00
Alfalfa land, 20 " " 35.00 " "	700.00
Improvements	1600.00
Total	$16225.00

255 Boggs Hot Springs Ranch.

Township 46 N., range 28 E., M. D. B. & M.

Meadow land, 177 acres, at $20.00 per acre	$ 3540.00
Irrigated pasture, 138 acres, at $10.00 per acre	1380.00
Total	$ 4920.00

Knott Creek Ranch.

Township 43 N., range 27 E., &
" 44 N., " 27 E., M. D. B. & M.

Grain land, 104 acres, at $35.00 per acre	$ 3640.00

Garden, .25 acres	15.00
Improvements	340.00
Total	$ 3955.00

Crane Creek Ranch.

Township 43 N., range 27 E., M. D. B. & M.

Meadow land, 31 acres, at $35.00 per acre	$ 1085.00
Irrigated pasture, 29 acres, at $15.00 per acre	435.00
Total	$ 1520.00

Cove Meadows Ranch.

Township 42 N., range 27 E., M. D. B. & M.

Meadow land, 85 acres at $35.00 per acre	$ 2975.00
Irrigated pasture, 71 acres at $10.00 per acre	710.00
Improvements	50.00
Total	$ 3735.00

Big Creek Ranch.

Township 44 N., range 30 E., M. D. B. & M.

Alfalfa land, 156 acres at $40.00 per acre	$ 6240.00
Grain land (rocky), 31 acres at $20.00 per acre	620.00
Meadow land, 12 acres at $25.00 per acre	300.00
New land, 20 acres at $30.00 per acre	600.00
Orchard, 2.20 acres at $50.00 per acre	110.00
Improvements	600.00
Total	$ 8470.00

259 Quinn River Ranches.

Township 42 N., range 31 E.,
" 43 N., " 31 E.,
" 43 N., " 32 E., M. D. B. & M.

Map No. 1 (Bilk Creek Ranch).

Alfalfa land, 54 acres at $45.00 per acre	$ 2430.00
Alfalfa and barley, 28.5 acres at $35.00 per acre	997.50
Meadow land, 492 acres at $25.00 per acre	12300.00
Irrigated pasture, 214 acres at $10.00 per acre	2140.00
Barley land, 47 acres at $25.00 per acre	1175.00

260 Map No. 2.

Irrigated pasture, 208.50 acres at $10 per acre	2085.00

Map No. 3.

Meadow land, 447 acres at $20.00 per acre	8940.00
Irrigated pasture, 278 acres at $10.00 per acre	2780.00
Improvements	3000.00
Total	$35847.50

Hog John Ranch.

261 Township 42 N., range 34 E., M. D. B. & M.

Meadow land, 252 acres at $20.00 per acre	$ 5040.00
Irrigated pasture, 233 acres at $10.00 per acre	2330.00
Improvements	50.00
Total	$ 7420.00

Humboldt River Ranch.

Township 36 N., range 38 E., M. D. B. & M.

Town lots and other lands within the limits of the town of Winnemucca, about 22 A at $125.00 per acre	$ 2750.00

Grazing land, 309 acres at $12.00 per acre	3708.00
Meadow land, 220 acres at $20.00 per acre	4400.00
Grazing land, 500 acres at $7.50 per acre	3750.00
Improvements	2500.00
Total	$17108.00

King's River Basin Ranch.

Township 42 N., range 34 E., M. D. B. & M.

Water and tules, 853 acres at $5.00 per acre	$ 4265.00
Tules and grass, 299 acres at $7.00 per acre	2093.00
Total	$ 6358.00

Recapitulation.

Name of ranch.	No. of acres.	Valuation.
Leonard Creek	$ 172.50	$ 7165.00
Clark	135.50	3560.00
Battle Creek	150.00	5110.00
Piute Meadows	249.50	7914.00
Soldier Meadows	157.75	5845.00
Mud Meadows	368.25	7470.00
McKinney Camp	46.25	717.50
Virgin Valley	374.00	6950.00
Alder Creek	485.00	16,225.00
Boggs Hot Springs	315.00	4920.00
Knott Creek	104.25	3955.00
Crane Creek	60.00	1520.00
Cove Meadows	156.00	3735.00
Big Creek	221.20	8470.00
Quinn River (including Bilk Creek)	1769.00	35,847.50

265	Name of ranch.	No. of acres.	Valuation.
	Hog John	485.00	7420.00
	Humboldt River	1051.00	17,108.00
	King's River Basin	1152.00	6358.00
		7352.20	$149,290.00
	Scattered grazing land at $3.50	50032.09	175,112.31
		57,584.29	$324,402.31

Washoe County.

266 Massacre Ranch.

Township 42 N., range 21 E., M. D. B. & M.

Meadow land, 79 acres at $30.00 per acre	$ 2370.00
Irrigated pasture, 7 acres at $10.00 per acre	70.00
Improvements	50.00
Total	$ 2490.00

Long Valley Ranch.

Township 42 N., range 19 E., M. D. B. & M.

267 Meadow land, 162 acres at $35.00 per acre	$ 5670.00
Irrigated pasture, 67 acres at $12.00 per acre	804.00
Improvements	500.00
Total	$ 6974.00

Bitner Ranch.

Township 44 N., range 22 E., M. D. B. & M.

Meadow land, 70.50 acres at $15.00 per acre	$ 1057.00
Improvements	50.00
Total	$ 1107.00

Scattered second-class grazing land at $6.00	23,054.5	$138,327.00
Massacre Ranch	86.	2,490.00
Long Valley Ranch	229.	6,974.00
Bitner Ranch	70.5	1,107.00
	23,440.	$148,898.00

Personal Property.

(Washoe County, Nevada.)

	No.	Per head.	Valuation.
Dry cows	713	$ 40.00	$ 28,520.00
Calves	520	10.00	5,200.00
Bulls	25	45.00	1,125.00
Cows and calves	177	45.00	7,965.00
Tools and implements			637.00
Furniture			75.00
Saddle horses	20	50.00	1,000.00
Work horses	6	110.00	660.00
Milch cows	2	45.00	90.00
Hay, 165 tons at $6 per ton			990.00
			$ 46,262.00
Valuation of land and improvements			148,898.00
Total valuation, Washoe County			$195,160.00

271 Personal Property.
(Humboldt County, Nevada.)

	No. head.	Per value.	Valuation.
Mixed steers	510	$ 40.00	$ 20,400.00
Weanling bulls	100	25.00	2,500.00
Cows, dry	3291	40.00	13,164.00
Cows and calves	1240	45.00	55,800.00
Yearling heifers	858	27.00	23,166.00
Two-year-old heifers	360	37.00	13,320.00
272 Yearling steers	81	35.00	2,835.00
Weanling steers	158	20.00	3,160.00
Weanling heifers	700	17.00	11,900.00
Mixed cattle	1985	30.00	59,550.00
Dairy cows	45	45.00	2,025.00
Calves	310	10.00	3,100.00
Hereford bulls	140	100.00	14,000.00
Range bulls	230	45.00	10,350.00
Work horses	164	110.00	18,040.00
Work mules	49	110.00	5,390.00
273 Saddle horses	160	50.00	8,000.00
Suckling colts	23	25.00	575.00
Three-year-old colts	4	75.00	300.00
Range horses	450	40.00	18,000.00
Pack mules	22	75.00	1,650.00
Stallions	10	250.00	2,500.00
One jack			200.00
Burros	14	15.00	210.00
Hogs	67	4.00	268.00
Rams	307	20.00	6,140.00
Breeding ewes	12,600	7.00	88,200.00

	No. head.	Per value.	Valuation.
Ewe lambs	4,200	4.00	16,800.00
Yearlings (sheep)	1,190	5.00	5,950.00
Lambs	550	4.00	2,200.00
Wagons, harness and implements			12,442.00
Furniture and utensils			1,740.00
Provisions			939.00
Flour			226.00
Sundry supplies			5,642.00
Grain			3,525.00
New hay, 4,892 tons at $6			29,172.00
Old hay, 715 tons at $6			4,290.00
Quinn River store merchandise			11,242.00
			$478,911.00

Additional shipped after October 14th, 1916.

31 2-year steers at $50.00	$ 1,650.00
577 cows at $35.00	20,195.00
151 yearlings at $27.00	4,077.00
141 calves at $10.00	1,410.00
13 bulls at $40.00	520.00
651 old cows at $25.00	16,275.00
90 old cows at $25.00	2,250.00
65 calves at $10.00	650.00
24 bulls at $40.00	960.00
41 steers at $35.00	1,435.00
445 weaned calves at $10.00	4,450.00
77 cows and calves at $40.00	3,080.00
10 stags at $40.00	400.00

277	251 steers, one year at $35.00	8,785.00
	250 old cows at $30.00	7,500.00
	426 calves at $10.00	4,260.00
	15 bulls at $30.00	450.00
	7 heifers, one year at $27.00	189.00
		$ 78,636.00
	6704 lambs and wool and pelts	40,291.39
	Brought forward	478,911.00
278	Total value of personal property	$597,838.39

Lyon County Property.
(Real Estate.)

(Township 13 N., R. 35 E.; township 14 N., range 25 E.; township 15 N., range 25 E.; township 14 N., range 26 E.; township 15 N., range 26 E.).

	Alfalfa land, 140 acres at $60.00 per acre	$ 8,400.00
	Grain land, 100 " " 50.00 " "	5,000.00
	Alfalfa land, 200 " " 50.00 " "	10,000.00
279	Alfalfa land, 500 " " 40.00 " "	20,000.00
	Grain land, 200 " " 35.00 " "	7,000.00
	Meadow land, 580 " " 30.00 " "	17,400.00
	Past. land, 14500 " " 12.00 " "	174,000.00
	Desert land, 4284 " " 8.00 " "	34,272.00
		$276,072.00
	Improvements	6,250.00
		$282,322.00

Personal Property.

	No. Head	Value Per head.	Valuation.
Work horses	24	$110.00	$ 2,640.00
Saddle horses	15	50.00	750.00
Brood mares	101	50.00	5,050.00
Stallions	8	200.00	1,600.00
One and two-year-old colts	60	40.00	2,400.00
Yearling colts	85	25.00	2,125.00
Yearling steers	574	35.00	20,090.00
Two-year-old steers	62	50.00	3,100.00
Cows	530	40.00	21,200.00
Bulls	32	45.00	1,440.00
Harness			250.00
Hogs	150	10.00	1,500.00
Pigs	400	4.25	1,700.00
Wagons			1,250.00
Hay on Campbell Ranch—600 tons at $6.00 per ton			3,600.00
Hay on Mason Ranch—440 tons at $6.00 per ton			2,640.00
Barley, 2,200 sacks at $1.75 per sack			3,850.00
Wheat, 652 " " 2.17 " "			1,356.25
Oats, 150 " " 1.60 " "			240.00
Furniture			312.00
Total personal property			$77,093.00

283 Recapitulation.

Humboldt County Total Valuation (Nevada).

Real estate and improvements	$324,402.31
Personal property	597,838.39
Total	$922,240.70

Washoe County Total Valuation (Nevada).

Real estate and improvements	$148,898.00
Personal property	46,262.00
284 Total	$195,160.00

Lyons County Total Valuation (Nevada).

Real estate and improvements	$282,322.00
Personal property	77,093.00
	$359,415.00
Less damage to lands, etc.	12,250.00
285 Total	$347,165.00

Total Valuation in Nevada.

Humboldt County	$ 922,240.70
Washoe County	195,160.00
Lyon County	347,165.00
Grand total	$1,464,565.70

I find the foregoing property at all times herein mentioned belonged to the Pacific Live

Stock Company, a corporation incorporated under the laws of the State of California. All of the capital stock of the Pacific Live Stock Company at all times herein mentioned belonged to Miller & Lux Incorporated, a corporation incorporated in 1905, under the laws of the State of Nevada, and having its principal place of business in Carson City, Ormsby County, State of Nevada, and authorized by its articles of incorporation to have, and having a branch office in the City and County of San Francisco, State of California.

Upon the 17th day of April, 1913, the said Henry Miller was the owner of 119,871.75 shares of the capital stock of said Miller & Lux Incorporated, the total number of shares of stock of said corporation being 120,000 shares.

The said Henry Miller at all times herein mentioned was a resident of the City and County of San Francisco, State of California, and that said shares of stock, to the extent that the same represented the said land and personal property in the State of Nevada, constituted property of the said Henry Miller, subject to the inheritance tax act of the State of Nevada, and the same stock did represent a 119,871.75-120,000ths of the value of the land and personal property aforesaid.

(Signed) William Blattner.

289 State of Nevada,
County of Washoe.—ss.

I, Wm. Blattner, duly appointed inheritance tax appraiser, do hereby certify that the foregoing appraisement of the land and personal property involved in the above entitled proceeding is correct to the best of my knowledge and belief.

WILLIAM BLATTNER.

290 Subscribed and sworn to before me this 19th day of March, 1917.

(Seal) A. N. SALISBURY,
Notary Public.

Petitioner's Ex. A.
WILLIAM BLATTNER.

(Endorsed): Filed Mar. 19, 1917,
E. H. BEEMER,
Clerk.

291

[Title of Court and Cause.]

NOTICE OF HEARING AND AFFIDAVIT OF SERVICE THEREOF.

To Hon. George A. Cole, state controller of the State of Nevada, petitioner, and Hon. George B. Thatcher, attorney general of the State of Nevada, Hon. E. F. Lunsford, district attorney of the County of Washoe, State of Nevada, attorneys for petitioner;

To treasurer of the County of Washoe, State of Nevada; treasurer of the County of Humboldt, State of Nevada; treasurer of the County of Lyon, State of Nevada, and treasurer of County of Ormsby, State of Nevada:

To J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust dated April 17th, 1913, from Henry Miller, deceased, to said trustees, respondents, and Messrs. Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, Esq., attorneys for respondents:

Notice is hereby given by the undersigned, William Blattner, duly appointed inheritance tax appraiser in the above entitled matter, to all persons known to have a claim or interest in the property to be appraised therein, including the state controller of the State of Nevada, and the treasurer of the counties in which such tax is to be paid, that the 7th day of February, 1917, at the hour of 10 o'clock A. M., and the office of the district attorney of the County of Washoe, State of Nevada, in the court house in the City of Reno, County of Washoe, State of Nevada, are hereby fixed as the time and place at which the said appraiser will fix the clear market value of all the property in the State of Nevada involved in said proceeding, and at which time

and place he will hear all persons interested in the appraisement in said matter, all in accordance with the provisions of the act of the legislature of the State of Nevada entitled: "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act, and for suits to quiet title against claims of lien arising hereunder", approved March 26th, 1913.

And notice is further given that at said time and place the said appraiser will appraise the said property at its fair market value, and for the purpose of making said appraisement said appraiser shall take the evidence of witnesses under oath concerning such property and the value thereof, and will make report thereof and of such value in writing to the said district court, together with the depositions of the witnesses examined, if any, and such other facts in reference thereto as said district court may order or require, within thirty days from the date of such direction, unless further time be granted by the court.

Dated, January 22, 1917.

WILLIAM BLATTNER,
Inheritance Tax Appraiser.

298 [Title of this Court and Cause.]

AFFIDAVIT OF MAILING NOTICES.

State of Nevada,
County of Washoe.—ss.

William Blattner, being first duly sworn, deposes and says:

That he is the duly appointed inheritance tax appraiser in the above entitled matter; that on the 22d day of January, 1917, he mailed a copy
299 of the annexed notice fixing a time for hearing in the above entitled matter to the parties hereinafter named, by depositing a copy of the said notice in a sealed envelope, postage prepaid, in the United States postoffice at the City of Winnemucca, State of Nevada, and addressed to the said parties at their places of residence as follows, to wit:

Honorable George A. Cole, state controller of the State of Nevada, Carson City, Nevada.

300 Honorable George B. Thatcher, attorney general of the State of Nevada, Carson City, Nevada.

Honorable E. F. Lunsford, district attorney of the County of Washoe, State of Nevada, Reno, Nevada.

Treasurer of the County of Washoe, Reno, Nevada.

Treasurer of the County of Humboldt, Winnemucca, Nevada.

Treasurer of the County of Lyon, Yerington, Nevada.

Treasurer of the County of Ormsby, Carson City, Nevada.

J. Leroy Nickel, Merchants Exchange Building, San Francisco, California.

Nellie Miller Nickel, Merchants Exchange Building, San Francisco, California.

Messrs. Cheney, Downer, Price & Hawkins, Reno, Nevada.

Edward F. Treadwell, Merchants Exchange Building, San Francisco, California.

And the places to which said notices were so directed, as aforesaid, were the respective post-office addresses of said parties.

WILLIAM BLATTNER.

Subscribed and sworn to before me this 9th day of February, 1917.

(Seal) ROBERT M. PRICE,
Notary Public.

(Endorsed): Filed this 19th day of March, 1917.

E. H. BEEMER,
Clerk.

304 [Title of Court and Cause.]

NOTICE OF FILING REPORT AND APPRAISEMENT.

To Hon. George A. Cole, state controller of the State of Nevada, petitioner, and Hon. George B. Thatcher, attorney general of the State of Nevada, Hon. E. F. Lunsford, district attorney of the County of Washoe, State of Nevada, attorneys for petitioner:

To the treasurer of the County of Washoe, State
305 of Nevada; treasurer of the County of Humboldt, State of Nevada; treasurer of the County of Lyon, State of Nevada; and treasurer of County of Ormsby, State of Nevada; and

To the respondents in the above entitled action, and Messrs. Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, attorneys for said respondents:

306 You and each of you will please take notice that the undersigned, William Blattner, duly appointed inheritance tax appraiser in the above entitled matter, has made and filed his appraisement and report to the above entitled court, and that anyone interested in said proceeding may file exceptions to said report within twenty days from the filing thereof.

You will further take notice that duplicates of said appraisement have been duly filed in the

307 offices of the county clerks of the Counties of Humboldt, Lyon and Ormsby, State of Nevada.

Dated, March 19th, 1917.

WILLIAM BLATTNER.

State of Nevada,
County of Washoe.—ss.

William Blattner, being first duly sworn, deposes and says:

That he is the duly appointed inheritance tax
308 appraiser in the above entitled matter; that on the 19th day of March, 1917, he deposited a copy of the annexed notice in the United States post-office, in the City of Reno, County of Washoe, State of Nevada, postage prepaid, and addressed to the respective parties interested in the above entitled matter, as follows, to wit:

One copy to George A. Cole, state controller, Carson City, Nevada.

309 One copy to George B. Thatcher, attorney general, Carson City, Nevada.

One copy to E. F. Lunsford, district attorney, Reno, Nevada.

One copy to the treasurer of the County of Washoe, Reno, Nevada.

One copy to the treasurer of the County of Humboldt, Winnemucca, Nevada.

One copy to the treasurer of the County of Lyon, Yerington, Nevada.

310 One copy to the treasurer of the County of Ormsby, Carson City, Nevada.

One copy to Cheney, Downer, Price & Hawkins, Reno, Nevada.

One copy to Edward F. Treadwell, Merchants Exchange Building, San Francisco, Cal.

WILLIAM BLATTNER.

Subscribed and sworn to before me, this 19th day of March, 1917.

311 (Seal) A. N. SALISBURY,
Notary Public.

(Endorsed): Filed Mar. 19, 1917,
E. H. BEEMER,
Clerk.

[Title of Court and Cause.]

TRANSCRIPT OF PROCEEDINGS BEFORE INHERITANCE TAX APPRAISER.

312 To the Honorable, the second judicial district court of the State of Nevada, in and for the County of Washoe:

William Blattner, the undersigned, as inheritance tax appraiser of the estate of Henry Miller, deceased, in the above entitled court and cause, hereby transmits and files his report and appraisement of the property of said Henry Miller, deceased, and the estate of Henry Miller, deceased, together with a transcript of all testi-

313 mony and all exhibits, papers, records and files considered by him in arriving at said appraisement, together with the depositions of witnesses examined, for such other or further action as the court may deem advisable and as the law required.

Dated this 19th day of March, A. D. 1917.

WILLIAM BLATTNER.

[Title of Court and Cause.]

314 TRANSCRIPT OF PROCEEDINGS BEFORE INHERITANCE TAX APPRAISER.

This being the time and place heretofore set and fixed by the court at which the appraiser in the above entitled matter would receive evidence and hear testimony in the matter of fixing the market value of all property in the State of Nevada involved in the above proceedings, there were present:

315 William Blattner, inheritance tax appraiser; Edward F. Treadwell, Esq., and S. S. Downer, Esq., representing J. Leroy Nickel and Nellie Miller Nickel, trustees of the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17th, 1913, from Henry Miller, deceased, to said trustees, respondents, together with Edward F. Lunsford, Esq., district attorney of Washoe County, representing George A. Cole, as state controller of

316 the State of Nevada, petitioner, pursuant to the following notice of hearing issued by William Blattner, inheritance tax appraiser, i. e.:

[Title of Court and Cause.]

NOTICE OF HEARING.

To Hon. George A. Cole, state controller of the State of Nevada, petitioner, and Hon. George B. Thatcher, attorney general of the State of Nevada, Hon. E. F. Lunsford, district attorney of the County of Washoe,
317 State of Nevada, attorneys for petitioner:

To treasurer of the County of Washoe, State of Nevada; treasurer of the County of Humboldt, State of Nevada; treasurer of the County of Lyon, State of Nevada; treasurer of the County of Ormsby, State of Nevada:

To J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy
318 Nickel and Nellie Miller Nickel, trustees under a certain deed of trust dated April 17th, 1913, from Henry Miller, deceased, to said trustees, respondents, and Messrs. Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, Esq., attorneys for respondents:

Notice is hereby given by the undersigned, William Blattner, duly appointed inheritance tax appraiser in the above entitled matter, to all persons known to have a claim or interest in the

property to be appraised therein, including the state controller of the State of Nevada, and the treasurer of the counties in which such tax is to be paid, that the 7th day of February, 1917, at the hour of 10 o'clock A. M., and the office of the district attorney of the County of Washoe, State of Nevada, in the court house in the City of Reno, County of Washoe, State of Nevada, are hereby fixed as the time and place at which the said appraiser will fix the clear market value of all the property in the State of Nevada involved in said proceeding, and at which time and place he will hear all persons interested in the appraisement in said matter, all in accordance with the provisions of the act of the legislature of the State of Nevada entitled: "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act, and for suits to quiet title against claims of lien arising hereunder," approved March 26th, 1913.

And notice is further given that at said time and place the said appraiser will appraise the said property at its fair market value, and for the purpose of making said appraisement said appraiser shall take the evidence of witnesses under oath concerning such property and the

322 value thereof, and will make report thereof, and of such value in writing to the said district court, together with the depositions of the witnesses examined, if any, and such other facts in reference thereto as said district court may order or require, within thirty days from the date of such direction, unless further time be granted by the court.

Dated, January 22, 1917.

WILLIAM BLATTNER,

323 Inheritance Tax Appraiser.

Proof was thereupon made that on the 22d day of January, 1917, the said William Blattner, inheritance tax appraiser, duly mailed copy of the foregoing notice to the following named persons, to wit:

George A. Cole, state controller of the State of Nevada, petitioner;

Hon. Geo. B. Thatcher, attorney general of the

324 State of Nevada; and

Hon. E. F. Lunsford, district attorney of Washoe County, State of Nevada, attorneys for petitioner;

To the treasurer of the County of Washoe, State of Nevada;

To the treasurer of the County of Humboldt, State of Nevada;

To the treasurer of the County of Lyon, State of Nevada;

325 To the treasurer of the County of Ormsby, State of Nevada;

To J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased;

To J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17th, 1913, from Henry Miller, deceased, to said trustees, respondents; and

326 To Messrs. Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, Esq., attorneys for respondents;

Thereupon, the following proceedings were had:

It was ordered by the inheritance tax appraiser, William Blattner, that M. I. Callahan be appointed to report these proceedings, and that the same be transcribed.

327 Mr. TREADWELL. We understand that the inheritance tax appraiser is now working on the appraisement of the property in Humboldt and Washoe counties, and that on Saturday, February 10th, 1917, he intends to go to Lyon County, for the purpose of examining and appraising the property in Lyon County, and for that reason it would probably save a great deal of testimony, if this hearing could be adjourned until the work is completed, so we suggest that the hearing now be continued until such a date as will enable the appraiser to complete the work which is contem-

328 plated, if that is satisfactory to the representative of the petitioner.

Mr. LUNSFORD. That will be satisfactory to the representative who is present of the petitioner.

Mr. TREADWELL. What date would you suggest, Mr. Lunsford?

Mr. LUNSFORD. Would it be agreeable to you to have the appraiser himself fix a date at the completion of the work just mentioned by you, Mr. Treadwell?

329 Mr. TREADWELL. I would prefer a date certain be fixed, and of course, we could arrange for a continuance if it developed that Mr. Blattner was not ready then. It seems to me if this went over say, until about the 24th of February, that is a Saturday.

Mr. LUNSFORD. I do not know that my presence will be required in this, but I do know that I start on the 21st on four criminal cases, one to follow the other.

330 Mr. TREADWELL. It is quite true that that date will be entirely tentative.

Mr. DOWNER. Would that date be satisfactory to you, Mr. Blattner?

Mr. BLATTNER. Yes, sir, I think it would.

Mr. TREADWELL. I would like to state for the record that my own idea of the matter is that there is every probability that an appraisement can be arrived at between Mr. Blattner and yourself and myself and Judge Downer, that will be satisfactory, at any rate, there is a great deal

331 of reason to believe that that would be so, and if that can be done outside of the formal hearing upon this matter, of course, a great deal of time and energy could be saved in putting in testimony. Of course, while any of us would not want to agree to an appraisement, I think we can thus save a great deal of time and not materially change the result. So I think if we would have a couple of weeks to allow Mr. Blattner to complete his work and get it in proper shape, it is
332 quite likely that anything more than a formal hearing can be avoided.

Mr. LUXSFORD. Yes, I think that that could be arranged.

Mr. TREADWELL. Then it is satisfactory to continue the matter until the 24th?

Mr. LUXSFORD. Yes.

Whereupon, it was ordered by the inheritance tax appraiser, William Blattner, that the matter be continued until the 24th day of February,
333 A. D. 1917, at the hour of 10 o'clock A. M., at the same place as designated in the original notice.

[Title of Court and Cause.]

This is the time set for the hearing of the appraisement in the above entitled matter.

Present:

William Blattner, appraiser appointed according to stipulation for the counties of Humboldt, Washoe and Lyon.

334 Appearances: George B. Thatcher, attorney general, and E. F. Lunsford, district attorney of Washoe County, for petitioners.

Edward F. Treadwell and S. S. Downer for respondents.

Notice of the continuance given by William Blattner, inheritance tax appraiser, was filed and made a part of this record, and due proof of the service thereof, made by all of the parties in interest.

335

[Title of Court and Cause.]

NOTICE OF CONTINUANCE.

You are hereby notified that the hearing in the above entitled matter has been duly continued to the 10th day of March, 1917, at the same hour and place as the previous hearing.

WM. BLATTNER,
Inheritance Tax Appraiser.

336 (Sent out March 1, 1917.)

Mr. THATCHER. I want to offer in evidence the testimony taken in the Superior Court of the State of California, for the City and County of San Francisco, in the matter entitled "In the matter of the estate of Henry Miller, deceased" being an inquiry into the inheritance tax due to the State of California in the estate of Henry

337 Miller, deceased, and consisting of seven (7) volumes, marked exhibit "B".

Mr. Treadwell. We are willing to stipulate that the testimony taken at that time may be incorporated in the record here, the same as if taken in this proceeding.

Mr. Thatcher. No objection. It may be considered as part of these proceedings?

Mr. Treadwell. A. Yes. The three exhibits which are referred to in the testimony as
338 "Respondent's exhibit 1", being the last will and testament of Henry Miller, deceased, "Respondents exhibit 2" being the codicil, and "Respondent's exhibit 3" being a certain deed of trust dated April 17, 1913, have been printed, and we ask that the printed copies be made a part of that record.

Mr. Thatcher. No objections. Mr. Blattner you have made an examination of the properties in this estate?

339 A. I have.

Q. Where are they located, in what counties?

A. In Humboldt, Washoe and Lyon counties.

Q. You have made a personal inspection and appraisement of the property in these three counties?

A. I have.

Q. You have gone over the inventories of the personal property?

A. I have.

340 Q. You have made a personal inspection of all of the ranches and property in this controversy?

A. Yes, sir.

Q. You made an appraisement of all of the property?

A. All the property that I found on record.

Q. Did you segregate it into the various counties?

A. I did.

Q. Showing the land and personal property
341 in each of the respective counties involved in this proceeding?

A. I have.

Q. Have you reduced that to writing?

A. I have.

Q. In the form of an appraisement and report?

A. It is.

Q. Is this the report (indicating)?

342 A. It is.

Mr. THATCHER. I offer this report in this hearing, it being the report of William Blattner, made in writing, and which will be verified as up-to-date.

Q. Do you consider that the appraisement and valuation which you have placed upon both real and personal property, lands and livestock, represents the full, clear value of the property which you have appraised?

A. To the best of my knowledge.

343 Q. Do you consider that the appraisement made in your report, and the valuations therein set forth of the land and livestock, personal property and improvements, is an appraisement and valuation of the property at its fair market value?

A. I do.

Q. And at its fair market value in the ordinary course of trade?

A. I do.

344 Q. Do you consider this appraisement and the facts which you have therein set forth, a fair and good appraisement of the property?

A. I do.

Q. What is your business, Mr. Blattner?

A. Well I retired from farming and stock raising last summer on.

Q. Prior to last summer had you been engaged in the land and livestock business in this state?

345 A. Yes, sir.

Q. And you likewise had been an owner of land?

A. Yes, sir.

Q. And you had been a land owner and stock-raiser in the County of Humboldt?

A. Yes, sir.

Q. Are you familiar with land values in Humboldt County?

A. I ought to be, I lived there for twenty-nine years and followed the business.

346 Q. You are familiar with land and livestock values in that county during the same period?

A. I am, yes, sir.

Q. And with the land and livestock business throughout the State of Nevada, especially in Humboldt, Washoe and Lyon counties?

A. Yes, sir.

Q. Generally livestock values are the same throughout the state?

A. Generally.

347 Q. Land values may vary throughout the various counties?

A. Yes.

Q. You have taken into consideration such variation throughout the various counties in the making of the appraisement?

A. I have.

Mr. THATCHER. I think that is all.

Mr. TREADWELL. Mr. Blattner, as I understand it you attempted in your valuation to fix the valuation of the various properties as of the

348 date of the death of Henry Miller, deceased?

A. I did.

Q. I would like to state for the record that instead of cross-examining Mr. Blattner, we would request that the further hearing of this matter be continued until Monday, the 19th of March, so as to enable us to check Mr. Blattner's report, as we are in hopes that we will be able to accept it rather than putting in any evidence in the matter, and we want to do that if we

349 find the report is within reasonable limits, in accordance with our view of the value of the property, and we think that that would probably save a great deal of expense to both parties.

Mr. THATCHER. There is no objection, and we stipulate that the hearing may be continued to the 19th day of March, at the hour of ten o'clock A. M. at the same place.

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350 [Title of Court and Cause.]

This being the time to which the further hearing before the appraiser in the above-entitled action was continued, to wit: Monday, March 19th, 1917, at ten o'clock A. M., for the purpose of taking such additional testimony as may be presented by respondents or any other parties interested, the said appraiser, William Blattner, being present, and George B. Thatcher, Esq., attorney general of the State of Nevada,
351 and E. F. Lunsford, Esq., district attorney of Washoe County, Nevada, appearing for the said petitioner, and Messrs. Cheney, Downer, Price & Hawkins and Edward F. Treadwell, Esq., appearing for respondents, the following proceedings were had at said time, as reported by J. Lozano, shorthand reporter, to wit:

Mr. TREADWELL. Now, it will be stipulated that, additional parties having been brought into the case and proceeding, and we having duly entered our appearance for them and consented

352 that they may be bound by all the proceedings heretofore taken in the action in the same way as if they had originally been parties thereto, it will be stipulated that the answer already on file by the other respondents shall be deemed an answer on behalf of the respondents now brought in, in the same manner as if they had put in a separate answer in the case.

Mr. THATCHER. That may be stipulated. No further pleading on their part is demanded or

353 necessary.

Mr. TREADWELL. Now, I would like to have the record show at this time that so far as the appraisement of the physical properties referred to in the appraisement which has been submitted by Mr. Blattner is concerned, that after going over it, while we feel that in some respects the property is appraised at higher amounts than we personally feel that the property is worth, at the same time we recognize that the question

354 is one largely of opinion, and that it is obvious that an attempt has been made to make as fair an appraisement as possible, and that we do not believe that any good would result by taking further evidence as to the value of that physical property. So that we do not care to introduce any further testimony on that subject.

I would like to state, Mr. Thatcher, that of the property that is covered by the appraisement, that is, the real property, there is a certain amount of it that is held by the Pacific Livestock

355 Company under contracts of purchase from the State of Nevada; and that there are certain amounts still unpaid upon those contracts.

Mr. THATCHER. How many acres is that, Mr. Treadwell?

Mr. TREADWELL. I could not not state the acreage, Mr. Thatcher, but the amount that is due in the aggregate on all of the property is $40,759.50. I have just had that computed by the secretary of the company, who has charge
356 of the payments of interest and the principal on those contracts. And I think that that should naturally be deducted from the value of the property to the owners.

Mr. THATCHER. Did you take that into consideration, Mr. Blattner?

Mr. BLATTNER. No, sir. I did not know. I thought that was all paid. A big corporation, I thought it did not owe anything.

Mr. TREADWELL. Of course, that can be done
357 by the court.

Mr. THATCHER. I would suggest that we get the exact figures probably from the secretary. If you will give me that, I will check that with the surveyor general.

Mr. TREADWELL. You will have no difficulty. It is $40,759.50. You can readily check that with the surveyor general. I would suggest that that amount go into the record subject to correction.

Mr. THATCHER. No objection to that.

358 Mr. DOWNER. With the statement of Mr. Blattner, of course, that he did not take that into consideration in computing the amount.

Mr. BLATTNER. Yes.

Mr. TREADWELL. I suppose it might be stated generally, Mr. Blattner, that you simply appraised the physical properties that you have referred to in detail in your report as properties, and irrespective of whether there was anything owing either in their purchase to the State of
359 Nevada, or whether there was any bonded or other indebtedness of the corporation on them?

Mr. BLATTNER. I do not—I did not take that under consideration at all; just the property.

Mr. THATCHER. You did take that into consideration in one instance in Lyon County where you allowed a reduction of $12,250.00, damages to land, litigation pending?

Mr. BLATTNER. Yes, that was brought to our
360 attention here, that Lyon County property. That has been deducted already from the Lyon County property.

Mr. TREADWELL. Now, there are some matters that I had personal charge of in connection with the delivery of this deed of trust as to which I would like to be sworn and testify.

TESTIMONY OF EDWARD F. TREADWELL,

who, being duly sworn as a witness on behalf of the respondents, testified as follows, to wit:

361 Direct Examination.

Mr. Downer. (Question.) Mr. Treadwell, you knew Henry Miller in his life-time?

(Answer.) I did.

Q. And you acted as his attorney in various matters?

A. I did.

Q. I show you what is a copy of a deed of trust, dated April 17th, 1913, made by Henry Miller to Nellie Miller Nickel and J. LeRoy
362 Nickel, as trustees, and ask you if you remember the circumstances surrounding the making of that trust deed? I mean its execution.

A. I do. That is the one marked here as respondents' exhibit 3.

Q. Respondent's exhibit 3, yes. Where was that made?

A. It was executed at Mr. Miller's residence, in San Francisco, California.

Q. When was it executed?

363 A. It was executed on the day that it bears date, the 17th day of April, 1913.

Q. State generally what was done at the time of its execution with reference to its delivery, etc.?

A. On that day, I went to Mr. Miller's residence in San Francisco and there was present with me Mr. James Mason, who is a notary public and was at that time a notary public in San Francisco. Mr. Henry Miller signed the deed of trust at that time in my presence and

364 also in the presence of James Mason. After he had signed it, Mr. James Mason asked him if he acknowledged the signature as his signature, and acknowledged the instrument. He stated that he did. And Mr. Mason then attached to it the certificate of acknowledgment, which he then signed and sealed.

Q. What was then done with the instrument?

A. I asked Mr. Miller if he desired me to deliver the instrument to the trustees, his daugh-
365 ter and her husband, and he stated that he did. I then took the instrument to Nellie Miller Nickel, who was in the house at the time in another room, and she then signed her name to the acceptance of the trust, the words "Nellie Miller Nickel" where it appears here above the word "Trustees".

Mr. Mason was also present at that time and she acknowledged the execution of it to Mr. Mason at that time. I then handed it to Mr.
366 Mason with the direction that he take it to Mr. Nickel and have Mr. Nickel sign the acceptance and take his acknowledgment. During the same day, I found it in the possession of Mr. Nickel with his signature on it, "J. LeRoy Nickel" above the word "Trustees", as shown on this instrument, and acknowledged before James Mason.

Q. What was then done with the instrument?

A. I then told Mr. Nickel that Mr. Miller had directed me to deliver it to him, which I

then did. And Mr. Nickel and I talked over as to what to do with it, and decided that a safe deposit box should be obtained which would be in the exclusive custody of J. LeRoy Nickel and Nellie Miller Nickel, trustees. And we then arranged for the renting of a safe deposit box in the name of Nellie Miller Nickel and J. Leroy Nickel as trustees in the Mercantile Trust Company, of San Francisco, and situated in San Francisco. That box was rented in their names, the keys delivered one to Mrs. Nickel and one to Mr. Nickel, and this deed of trust was placed in that box.

Q. Do you know who had the key to the box?

A. One key was in the possession of Mr. J. LeRoy Nickel as trustee, and one in the possession of Nellie Miller Nickel as trustee, as far as I know from that time to the present.

Q. Have you knowledge of any instance when that instrument, the original instrument, was out of that box at any time?

A. I took the deed of trust out of the box after Mr. Miller's death, several days after Mr. Miller's death, went there personally with Mrs. Nickel, with her key; Mr. Nickel was out of town at the time. And I found the deed of trust there and it was withdrawn for the purpose of use in court. I have no personal knowledge of it being out of that box at any time between the time I put it in there and the time that it was taken out after Mr. Miller's death;

370 but in this record I believe Mrs. Nickel testified that on one occasion she took it out for a short time, a day or a few hours, I do not know which, and returned it.

Q. At the time of the execution of this trust deed were there any certificates of stock in Miller & Lux, Incorporated, transferred, or was anything done with reference to them?

A. Yes. As soon as the formalities were completed of the execution and acknowledgment
371 of the deed of trust, and after it had been signed by Mrs. Nickel and turned over to the notary, I returned to Mr. Miller's room where he was sitting, and there was present at that time the following certificates of capital stock in Miller & Lux, Incorporated: Certificate number 114 for 119,839.75 shares in the name of Henry Miller; certificate number 81 for two shares, also in the name of Henry Miller; also certificate number 92 for ten shares in the name of Frank B. Anderson;
372 also certificate number 113 in the name of David Brown.

Q. For how many shares?

A. For ten shares. Also certificate number 112 for ten shares in the name of C. Z. Merritt. Mr. Miller then, in my presence, endorsed certificate number 114 by writing his name on the back thereof, and also endorsed certificate number 81 by writing his name on the back thereof. The other certificates, namely, the one in the name of Frank B. Anderson was already endorsed in the

373 handwriting of Frank B. Anderson on the back thereof; certificate number 113 of David Brown was already endorsed by David Brown in his handwriting on the back thereof, and certificate number 112 in the name of C. Z. Merritt was already endorsed by C. Z. Merritt by writing his name on the back thereof.

I then asked Mr. Miller if he desired me to deliver all of these certificates which I have mentioned to Mr. and Mrs. Nickel as trustees
374 under the deed of trust which he had just executed, and he told me to do so. He then handed all of these certificates to me, and I then informed Mrs. Nellie Miller Nickel that I had them and would deliver them to Mr. Nickel, and proceeded on down town to Mr. Nickel's office and there delivered to him these certificates of stock.

Q. Do you know what he did with them?

A. Mr. Nickel then took certificate number 114
375 for 119,839.75 shares and delivered it to the secretary of the corporation for cancellation and for transfer to Nellie Miller Nickel and J. LeRoy Nickel as trustees. The secretary then cancelled that certificate by pasting it into his stock book, noting on the stub the words, "Cancelled by issuance of No. 115, date of cancellation 17 April, 1913", and also by blocking with red ink the names of the president and secretary which appeared on the certificate. This was done on the same date as the delivery of the deed of trust, namely, April 17th, 1913.

376 On the same date, the secretary of the corporation issued a new certificate, number 115, for 119,839.75 shares to Nellie Miller Nickel and J. LeRoy Nickel as trustees. This new certificate number 115, together with certificate number 92, standing in the name of Frank B. Anderson and endorsed by him, certificate number 113 standing in the name of David Brown and endorsed by him, and certificate number 112 standing in the name of C. Z. Merritt and endorsed by him, were
377 then in my presence put into an envelope which contained the following endorsement:

"The within certificates, to wit:

Certificate number	No. of shares.
115	119,839.75
92	10
113	10
81	2
112	10
Total	119,871.75

378 were this day delivered by Henry Miller to Nellie Miller Nickel and J. LeRoy Nickel as trustees.

Dated April 17th, 1913.

J. LeRoy Nickel, Trus."

Mr. Nickel signed that envelope in that manner, and the envelope with the certificates therein was then placed in the same safe deposit box with the deed of trust, and I did not see them again until after Mr. Miller's death, and then

379 the box was opened by Mrs. Nickel and the certificates were in the box in the envelope. Those certificates have ever since that time been in that safe deposit box in the City and County of San Francisco, except that after Mr. Miller's death they were withdrawn for a few hours when they were used in court in San Francisco.

Q. I will ask you, Mr. Treadwell, if after this trust deed and these certificates were executed and delivered, placed in the safe deposit
380 box as you testified, you had any further conversation with Mr. Henry Miller with reference to them?

A. Yes, I did. I do not remember the exact date, but I would estimate it as probably about a year after the transaction that I have testified to.

Q. What was that conversation?

A. Mr. Miller spoke to me about the same matter that he had spoken to Mrs. Nickel about
381 when she got the deed of trust out of the safe deposit box. He stated to me that there was a provision in the deed of trust in favor of a certain party, one of the specific legatees, beneficiaries, and he said that certain things had happened and he would like to change the provision of the deed of trust in favor of that party if it was possible to do so. He asked me whether it was. I do not know myself whether this was before he had had Mrs. Nickel get the deed of trust out and looked at it or not. At any rate,

382 he asked me if it was possible for any such a change to be made. I told him that in drawing the deed of trust that no power of revocation had been reserved, and that it was, therefore, impossible to make any change in it of any kind. And he said that he thought that was so, no use to talk about it any further. That was a way he had of ending a conversation when he was through with it, and he used that characteristic expression.

383 He was very anxious, I might say, to make this particular change. Something had happened in connection with this particular beneficiary that required that that change, in his judgment, should be made. That was the substance of the conversation at that time.

I did have one other conversation, I do not know as it is of particular importance, but I think about six months before Mr. Miller's death he spoke of the deed of trust and said, "I am
384 not sure, Mr. Treadwell," he says, "that I did justice to myself when I put all this property out of my hands". That was the substance of what he said at that time. I think those were the only times at which the subject was ever mentioned between us.

Mr. Dawson. Any questions you desire to ask?

Cross-Examination.

Mr. Thatcher. Q. The certificates of stock which stood in the names of Anderson, Brown

and Merritt were all the property of Henry Miller at the time of that transfer?

A. Oh, yes.

Q. He was the actual owner of them, although the stock stood in their names and was endorsed, he was the possessor of the certificates and the owner of the shares?

A. Yes, sir.

Mr. Thatcher. That is all.

Mr. Downer. Anything suggest itself to you, Mr. Blattner?

Mr. Blattner. No, sir, nothing at all.

Mr. Thatcher. That is all at this time. Now, do you want to close this hearing now?

Mr. Treadwell. So that the hearing may be closed and the papers transmitted to the court. That is as I understand it, so far as the computation of the tax, if the court finds one due, that is a mere matter of mathematics, just as well to be done then.

Mr. Thatcher. That is all.

Hearing closed.

(Endorsed): Filed this 19th day of March, 1917.

E. H. Beemer, Clerk.

388 TRANSCRIPT OF PROCEEDINGS BEFORE INHERITANCE TAX APPRAISER IN CALIFORNIA.

Filed Mar. 19, 1917.
E. H. BEEMER, Clerk.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 21,686 N. S. Dept. No. 9

389 Probate

In the Matter of the Estate of
Henry Miller,
Deceased.

The above entitled court having heretofore and on the.....day of....., 1916, duly given, made and entered its order ap-
390 pointing Hon. R. F. Mogan, theretofore duly appointed and qualified as inheritance tax appraiser in and for said City and County of San Francisco inheritance tax appraiser herein, and the said inheritance tax appraiser and the said court having heretofore set and fixed Thursday, the 23rd day of November, 1916, at 2 o'clock P. M. of said day and the office of William A. Sullivan, Esq., assistant inheritance tax attorney, rooms 302-

391 304 Humboldt Bank Building, San Francisco, California, as the time and place for the hearing before said inheritance tax appraiser of all questions relating to the inheritance tax in the above entitled matter, and the State of California and Hon. John S. Chambers, controller thereof appearing by Mr. Robert A. Waring, inheritance tax attorney, Mr. William A. Sullivan, assistant inheritance tax attorney, Mr. Hartley F. Peart, special counsel for the controller, and Mr. Ray-
392 mond Benjamin, chief deputy attorney general of the State of California; appearing for the executors and trustees of the estate of Henry Miller, deceased, and also as the personal representative of J. Leroy Nickel and Mrs. Nettie Miller Nickel, Mr. Edward F. Treadwell; representing the government of the United States and the Department of Internal Revenue, Mr. A. C. Scott, deputy internal revenue collector of the Northern District of California; also appearing Mr.
393 Walter G. Fitzgerald, appearing for Minnie P. Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Henry John Pfieffer, Minnie Elizabeth Pfieffer Turner and Albert S. Pfieffer.

It was stipulated between all counsel that the notice of motion for the hearing and the notices of hearing, subpoenas and other processes resulting in the present hearing may be deemed a part of the record in this proceeding, including the proof of service thereof, without any further

394 proof of the same, or without reading the same into the record and may be attached hereto.

It was also stipulated between all counsel and parties present that the testimony taken may be taken down in shorthand by the stenographer sworn by the inheritance tax appraiser for the purposes of this hearing. The inheritance tax appraiser then and there first duly put Lillian Herzog, a competent shorthand stenographer under oath to truly and accurately take down in
395 shorthand and thereafter transcribe into typewriting a complete and accurate record of all proceedings to be taken before said inheritance tax appraiser, and thereupon the State of California and said state controller called as a witness

MRS. NELLIE MILLER NICKEL

who being first duly sworn by said inheritance tax appraiser, R. F. Mogan, testified as follows:

396 Direct Examination.

MR. BENJAMIN. Mrs. Nickel, you are the daughter of Henry Miller, deceased?

WITNESS. Yes, sir.

Q. When did your father die?

A. The 14th of October.

Q. Of 1916?

A. 1916.

Q. How many children did he have living at the time of his death?

A. I am the only child.

397 Q. The only child. Had there been other children, or brothers or sisters of yours?

A. I have one brother and one sister.

Q. One brother and one sister?

A. Yes.

Q. They constitute the entire family?

A. Yes.

Q. Is either your brother or your sister living at the present time?

A. No.

398 Q. They died prior to the death of your father?

A. Yes, several years.

Q. Several years. Did they leave issue, either your brother or your sister?

A. No.

Q. No issue?

A. No issue.

Q. You are the wife of J. Leroy Nickel?

A. Yes.

399 Q. And you have one or two children?

A. Three.

Q. Three children,—a daughter?

A. A daughter and two sons.

Q. Two sons. The name of the daughter, please?

A. Beatrice Sarah Nickel.

Q. And what is her age?

A. Twenty-three.

Q. Twenty-three; and what are the sons names and ages?

400 A. George Wilmath Nickel, twenty-nine, and J. Leroy Nickel, Jr., twenty-one.

Q. Are either of your children married?

A. My oldest son, George Nickel.

Q. And he has issue of his marriage?

A. One child,—a daughter.

Q. A daughter,—what is the daughter's name, and her age, please.

A. Sarah Miller Nickel; she is nearly eleven months old.

401 Q. Eleven months of age?

A. Yes.

Q. You were born in California, were you not, Mrs. Nickel?

A. Yes.

Q. And where was your father born?

A. In Brockenheim, Germany.

Q. What was his age at the time of his death?

A. Eighty-nine; he was born in 1827.

Q. He was born in 1827?

402 A. Yes.

Q. From what document or data do you gather the information that he was born in 1827?

A. From what he told me.

Q. Only his own statement?

A. Only his own statement.

Q. Then, in 1916, at the time of his death, he was 89 years of age?

A. Yes.

Q. What was the birthday?

A. The 22nd of July.

403 Q. Then, according to your best knowledge or information, on the 22nd day of July of 1916, your father was 89 years of age?

A. Yes; I would have to subtract——

Q. 1827 from 1916 makes 89; that is correct.

A. It could be anything.

Q. That is your best information?

A. Yes.

Q. Now, I might say this, Mrs. Nickel,—there are a good many things—I am going to
404 propound questions to you that might require a little thought on your part before you can be entirely sure of your answer, and do not hesitate to take your entire time any time at all. Now, at the time of your father's death,—where did he reside?

A. At 2101 Laguna street.

Q. San Francisco?

A. Yes.

Q. California?

405 A. Yes.

Q. How long prior to his death had he been a resident of the State of California?

A. Well, that is—I think he came to California in 1851.

Q. And remained here how long?

A. The entire time.

Q. He was a citizen of the United States at the time of his death?

A. Yes.

406 Q. And had been for a considerable period of years prior to his death?

A. Yes.

Q. And at what place in California was his established residence, so far as the last ten or fifteen years of his life is concerned?

A. San Francisco.

Q. San Francisco, California; was it in the same house that you have just mentioned on Laguna street?

407 A. No, only after the earthquake of 1906.

Q. From 1906—after the disaster in San Francisco, and down to the time of his death, he resided at the house on Laguna?

A. Yes, sir.

Q. Laguna and Washington?

A. Laguna and Sacramento—the northwest corner.

Q. Your father was the Henry Miller who was interested in the corporation known as "Miller

408 and Lux"?

A. Yes, sir.

Q. And after 1906 did he make many or frequent trips from home over the various properties owned by that particular corporation?

A. All the time; he was very seldom at home.

Q. The properties of that corporation are located—you are somewhat familiar with the properties of the corporation?

A. Somewhat,—not in Oregon or Nevada.

409 Q. You know that there are some considerable properties in the State of Oregon as well as in Nevada and California—you know that as general knowledge?

A. Yes.

Q. The properties consist largely, so far as your knowledge is concerned, of agricultural, timber land and grazing lands?

A. Yes.

Q. You recall, do you, the formation, or,
410 rather, the time at which the corporation of Miller & Lux was formed,—the corporation itself?

A. No, I do not.

Q. You do not. Do you recall the fact, Mrs. Nickel, that for many years your father and Charles Lux were engaged in business, as a partnership, and that subsequently, after the death of Charles Lux, the present corporation of Miller & Lux was created; do you recall that
411 fact?

A. Oh, yes; yes, sir.

Q. And the stock,—was the stock of that corporation that was created,—was distributed, was it not, between the heirs of Charles Lux and your father?

A. Yes, sir.

Q. The entire properties that had been previously owned by your father and by Charles Lux were turned into this particular corporation of Miller & Lux at that time?

412 A. Yes; I suppose so.

Q. And then the heirs of Charles Lux received from the corporation certain numbers of shares of stock representing their distributive interests in the estate of Charles Lux?

A. Yes.

Q. Do you have any recollection of the basis upon which the property was at that time turned over to the corporation of Miller & Lux,—as to valuation?

413 A. No, sir.

Q. After the corporation was formed, the corporation of Miller & Lux, there were other corporations subsidiary thereto which were formed, were there not?

A. Well, there may have been.

Q. Such, for instance, as the San Joaquin Kings River Canal & Irrigation Co?

A. I am sure I do not know.

Q. You do not recall?

414 A. No.

Q. And after the corporation of Miller & Lux was formed your father assumed and performed the duties of the active managing head of that corporation?

A. Yes, he had always managed it.

Q. Your father was not much of an office man, was he, to stay in an office?

A. No.

Q. He was an outdoor man?

A. He attended to all the outside business,—all of it, in fact.

415 Q. That had been his habit and practice even when it was a partnership between him and Mr. Lux?

A. Yes, sir.

Q. Mr. Lux in the old days used to be the office man, did he not?

A. Yes.

Q. And your father was the outside man, the field man?

A. Yes, sir.

416 Q. And after the firm of Miller & Lux, or corporation, rather, was created, your father continued the same character of activities in behalf of the corporation that he had during the partnership?

A. Yes, sir.

Q. He was in the habit, was he not, of leaving home and going over the properties very frequently?

A. Yes, sir.

417 Q. As an approximate matter, Mrs. Nickel, how many days of the week or of the month or out of the year would you say that your father had given to the active supervision of the properties in the field, going over them?

A. Well, I should say fully ten months of the year, because he was home very seldom; I do not know exactly what you want me to say,—whether I talk too much or too little,—I mean to say he would come home for four or five days, stay away two weeks or more, then come

418 back, stay a couple of days, and go away again; he very seldom stayed any length of time in the city.

Q. He was very little at home, in the city?

A. Yes, sir.

Q. As a general average, too,—so far as time is concerned,—he would probably spend ten months of the years, easily, away from home going over the properties?

A. Almost that; of course not exactly,—that
419 is not exactly accurate, but approximately that.

Q. Now, up to the year 1906,—or rather you mention the new home established after 1906,—prior to that time where had he resided here in San Francisco?

A. No. 34 Essex street.

Q. Essex?

A. That is on Rincon Hill.

Q. And how many years had he resided there?

A. When was the fire at——

420 Q. Chicago?

A. No, not at Chicago.

Q. At Philadelphia?

A. Yes.

Q. 1872.

A. No.

Q. 1876.

A. Yes. We resided at 34 Essex street ever since 1876, from 1876 to 1906.

Q. Was it there that your mother died?

A. Yes.

421 Q. In April?

A. Yes.

Q. And subsequent to that time, he established the residence on Laguna street that you have mentioned?

A. Yes.

Q. After the establishment of the new home on Laguna street did your father continue in his activities with respect to the management of the properties?

422 A. Just the same.

Q. Down to that time?

A. Down to the time he was,—he had his attack of gout in 1910.

Q. 1910?

A. Yes, sir.

Q. Didn't he have some sort of an attack?

A. An attack of gout.

Q. Where was he at the time this attack came on?

423 A. He had just returned from a long trip to Bakersfield and was at the family home, 2101 Laguna.

Q. Was he confined to the house when the attack came on?

A. He was confined to the house for several weeks, and then we went to Gilroy, Arrowhead Springs,—Gilroy, three or four times afterwards.

Q. He was confined to the house several weeks; did he require the administrations of a physician?

424 A. Yes, Dr. Herzstein.

Q. Yes, Dr. Herzstein,—was it an attack in the foot?

A. In his feet.

Q. Both feet?

A. Yes.

Q. Both feet were affected?

A. Yes.

Q. Do you recall the month that the attack came on?

425 A. The 27th of November.

Q. 1910?

A. Yes.

Q. And how long was he confined to the house with that condition at that time?

A. Well, he was not—he was confined to the house until after Christmas, but then he went motoring all the time; he was confined to the house until after Christmas and then he motored every day.

426 Q. When he went on these motoring trips did he go alone?

A. No, I always went with him, and one of the nurses; if I did not my companion went with him; he did not like to go alone.

Q. Your companion,—who was the companion?

A. First Miss Underwood,—who is now married,—she lives south; and now Miss Jensen, she has been with me since 1912.

Q. What did you say the companion's name was,—Underwood did you say?

427 A. Yes.

Q. What is her present name?

A. Walden.

Q. And where does she live?

A. In Pasadena, but I do not know her address; you can get it, though,—Miss Jensen knows.

Mr. TREADWELL. Q. (spelling). Waldon?

A. Walden.

Q. Do you know her husband's business?

428 A. A lawyer.

Q. An attorney.

Mr. TREADWELL. I know him very well; I met a friend of his last night.

Q. He resides in Pasadena?

Mr. TREADWELL. He is an attorney in Los Angeles; he used to be with Hunsaker & Britt.

A. No, I haven't the slightest idea.

Q. Miss Underwood was your companion first who used to go upon these motor trips with you

429 and your father?

A. Yes; she never went when I went; father always liked to talk to somebody.

Q. Then, I understand that you did not accompany your father on these trips when she went?

A. No.

Q. She was your companion?

A. Yes.

Q. She took your place?

A. Yes.

430 Q. After she departed from your house—there was another companion that you mentioned?

A. Yes.

Q. Who was that?

A. Miss Jensca.

Q. Where does she live?

A. She is with me now.

Q. She has been with you constantly?

A. Yes.

Q. On these trips,—these motor trips that
431 you say you took with your father at that time,—I am now speaking of the year—the spring,—winter and spring of 1911, winter of 1910 and spring of 1911,—these trips, were they business or pleasure trips?

A. Pleasure trips, when he was in the city.

Q. Rest trips, in a way, you might say?

A. We motored two or three hours.

Q. A short way out of town and back again?

A. Yes.

432 Q. Did he attempt to visit any of the properties, for the purpose of looking them over?

A. In the city only,—that is, when he was in the city.

Q. For instance, what properties?

A. Well, he used to go to see how 34 Essex looked; Fifth and Howard streets——

Q. Would he get out of the car?

A. Yes.

Q. And talk to the people?

A. No, everything was burned over there.

433 Q. Just looking at them simply?

A. Yes.

Q. Nothing was rebuilt at that time?

A. He went out to see Mr. Levi.

Q. Who was Mr. Levi that you refer to?

A. Mr. Levi is a butcher,—he went out to see the meat?

Q. That was where?

A. That is on Bush street; I do not know where it is now.

434 Q. On Bush?

A. Yes, he had an office there.

Mr. TREADWELL. Henry Levi?

A. Yes, sir. He went out to see Christmas cattle once.

Q. How long was it after this attack of gout that you have mentioned before your father resumed active business operations?

A. Oh, almost never go to San Joaquin; he went to Gilroy several times and attended to
435 business there,—bought cattle and saw cattle, and he dictated every day to a stenographer, and managed business that way.

Q. Well, you say he went to Gilroy,—he never went to San Joaquin again?

A. No, it was too long a trip on account of his feet; I do not know whether you know,—the trains run very badly, and it was too long a distance,—several hours.

Q. But he did go down to Gilroy?

A. Yes, and he wanted to go to San Joaquin, but the doctor told him not to.

436 Q. Dr. Herzstein advised against it?

A. Dr. Herzstein told him not to go, but he went to Mount Madonna, at Gilroy.

Q. Do you recall when he made that trip?

A. Where?

Q. To Mount Madonna.

A. He went twice to Mount Madonna, but I think he was four or five times to Gilroy, but I am not sure.

Q. Do you recall, I would not pin you down
437 to dates, Mrs. Nickel, but to your best recollection, about the times he went to Gilroy?

A. No, I haven't the slightest idea. He went to Arrowhead for a month,—the doctor thought the waters would be good.

Q. Arrowhead Springs?

A. Yes.

Q. What month was that?

A. That was in 1911 that he went to Arrowhead.

438 Q. In the spring?

A. No, in the summer, we went in June or July.

Q. June or July?

A. Yes.

Q. And you were there a month?

A. Yes.

Q. Just yourself and father?

A. Yes.

Q. Did he have a nurse with him at that time?

A. Two nurses.

439 Q. Who were the nurses at that time?

A. Mr. Campbell and Mr. Lane.

Q. After the Arrowhead—did the Arrowhead Springs seem to help him?

A. Arrowhead Springs helped him a great deal.

Q. But after his return from there, how long was he at home here in San Francisco before making any other trip?

A. That I could not tell you.

440 Q. Some considerable period of time?

A. No, because he went to Gilroy that fall.

Q. Is that the next trip that you recall, after the Arrowhead trip?

A. That is the next trip.

Q. How long did he remain in Gilroy?

A. We were there two or three weeks.

Q. Did you go with him?

A. Yes.

Q. And were you with him during the entire

441 time he was at Gilroy?

A. Yes.

Q. Did he have nurses with him?

A. Yes.

Q. Now, this is in maybe August or September of 1911?

A. 1911, yes.

Q. And while you were at Gilroy how did he occupy himself?

A. He used to motor every day to see the different places.

442 Q. His properties?

A. Yes.

Q. And talked with the superintendents?

A. Talked with the superintendents and then the stenographer went down there and he also dictated to one of the men and he wrote himself.

Q. As a matter of fact, Mrs. Nickel, your father was a man very much given to writing out in longhand his own letters?

A. Yes, sir.

443 Q. That had been a habit of his for years?

A. Yes, sir.

Q. He wrote a very fine,—almost a German script, you might say?

A. Yes, it was a German hand.

Q. And how long did he continue to send his instructions in that way to people?

A. He continued to send his instructions until 1914.

Q. Until 1914; that is, by writing them out?

444 A. No, dictating.

Q. I was only referring to the letters in longhand.

A. I do not remember.

Q. Do you remember—can you remember, approximately, when it was that he ceased writing his letters, etc., in longhand, and took up the matter of typewriting with a stenographer?

A. I think in the fall of 1913 he stopped writing, but he continued having a stenographer until some time in 1914.

445 Q. While he was at Gilroy with you, in the fall of 1911, besides visiting the various properties and talking with the men on the properties about the general direction—I assume that it was a general direction of the properties themselves?

A. Yes.

Q. Did he engage in any independent purchasing,—property, cattle, matters of that kind?

A. Yes.

Q. That you recall? For instance, can you
446 give us some detail on that, Mrs. Nickel?

A. Yes, he bought some cattle from a man by the name of Bill Staten,—Mr. Fitzgerald knows his name, do you not?

Q. Bill Staten lives in Gilroy?

A. Yes.

Q. In 1911?

A. And afterwards he bought two lots of cattle from him.

Q. Mr. Staten lives there,—in Gilroy?

447 A. Yes.

Q. Were there any other business transactions, independently, as we might call them, consummated by your father during that particular visit in Gilroy that you can give?

A. No,—excepting about placing some cattle in fields for feeding and looking at some land over on the Balsa.

Q. Placing some cattle?

A. Yes, placing cattle for feeding.

Q. With whom did he deal?

448 A. Mr. C. M. Barney was superintendent at one time, and later Mr. Kincer.

Q. And you said something about looking ot some land.

A. Yes, looking about placing some cattle land, feed good for cattle.

Q. How was he getting around at this particular time with the attack of gout; was he still suffering from it?

A. He was suffering at times more than
449 others. The greatest weakness he had was kidney trouble.

Q. How long had he been suffering from that particular condition?

A. Not until he had the gout.

Q. It all developed about the same time?

A. No, the kidney trouble developed much later, because father walked in Gilroy, walked over to the stables and walked up and down stairs.

450 Q. Prior to the attack of gout that you mention, what had been his condition of health; had he other illnesses or sicknesses prior to that time?

A. Yes, sir.

Q. He was very rugged, hardy, sturdy?

A. Yes, sir.

Q. Had he ever been ill at home?

A. Yes, he had been ill; he fell off a board and broke a rib when he crossed a ditch.

Q. How long before?

451 A. Oh, several years.

Q. A temporary condition?

A. Yes, just a broken rib.

Q. And prior to this attack of gout,—that is the first thing of any real consequence, so far as health is concerned, that he had had to endure?

A. Yes, any serious trouble at all.

Q. When did he first ascertain that he was afflicted with kidney trouble?

A. Well, father,—medicine meant nothing to
452 him,—the only thing, Mr. Benjamin, was when father became excited or anything of course then that was the trouble, but I do not consider it was real kidney trouble from what Dr. Herzstein says; that is why he did not go out any longer.

Q. Did excitement seem to make him ill?

A. No, not when he was in the house.

Q. But outside? I meant to say when he was motoring in the park.

Q. How did it affect him, anything of that
453 kind,—you used the word "excitement",—I just wanted to know what you meant.

A. I mean to say he had to go to the toilet.

Q. Any excitement, then, or nervous strain or something, had that particular effect upon him, —that is all you meant?

A. Yes, sir.

Q. After the trip to Gilroy, when you were there two or three weeks, you did not go further than Gilroy over the properties?

A. No, just Gilroy and San Juan.

454 Q. And then returned home?

A. Yes.

Q. After that particular trip to Gilroy, do you recall—when was the next time that your father made a trip of that character or similar character?

A. I think,—I am not sure,—I think he went to Gilroy in the spring of 1912 and I went to Europe in the summer of 1912, and I knew Mr. Miller went to Gilroy in the fall of 1912, and he
455 went to Mount Madonna, which is twelve miles from Gilroy to the ranch and back to Mount Madonna and was there two or three weeks.

Q. Let us not have something put into the record that you do not understand—you say you went to Europe in the spring of 1912?

A. Yes, May.

Q. How long were you there?

A. I came back the last of October.

Q. Last of October. Now, that your father
456 made that trip during that year is only a matter of hearsay?

A. No, I know it.

Q. After you came back?

A. It is only hearsay,—Miss Jensca wrote me.

Q. That is it exactly. It is unquestionably true, but I wanted you to testify to what you know of your own knowledge. If he made that trip it was not with you present?

A. No.

457 Q. Then, as far as your own personal knowledge is concerned of any trip that he made in the year 1912, he made no trip that you were present on?

A. I am not sure, I think he went in the spring.

Q. Before you went to Europe?

A. Before I went to Europe.

Q. Do you recall the occasion sufficiently to describe it?

458 A. No, it was just the same as ever,—he went down there and drove around and saw the property.

Q. At Gilroy?

A. Yes.

Q. Your mother is buried at Mount Madonna?

A. No, Cypress Lawn.

Q. Then, you have some recollection, although you are not able to fix it exactly, of some trip made by your father,—made from the home here

459 in San Francisco and down to Gilroy or that vicinity in the spring of 1912, prior to the time you went to Europe?

A. I think so, but I am not sure.

Q. You are not positive. You do not say positively that he made such trip?

A. No.

Q. You returned in October, 1912, was it?

A. The very last of October, or the beginning of November.

460 Q. Now, after your return from Europe in 1912 did your father make any trips away from home in your company?

A. Yes.

Q. Where?

A. Gilroy.

Q. When was the first one at that time, that you recall—by the way, when you got back from Europe, Mrs. Nickel, what was the condition of his gout?

461 A. Very much better,—he went motoring after I returned.

Q. He had been in the habit of going to the office frequently?

A. He went to the office three or four times.

Q. Did he not go every day?

A. No.

Q. Three or four times in what period of time?

A. Well, in the time he was sick. If you will

462 remember, the Merchants Exchange is not particularly well adapted for anybody going to walk there.

Q. And that was where the office of Miller & Lux was situated?

A. Yes.

Q. Well, between the time that he was taken with this attack of gout that you have mentioned, and the time that you went abroad in 1912, what had been his custom or habit with respect to going down to the office?

463 A. I think he had been down there,—that is, very much oftener than he went then, and then I urged him not to go because he could not walk up and down the stairs that distance,—because you have to go quite a way.

Q. Did he have a stenographer in the office to take everything?

A. Nearly every day,—and sometimes he dictated two hours, sometimes three hours.

Q Out at the house?

464 A. Yes, sir.

Q. Then the letters were brought out to him?

A. Yes.

Q. Did he have many callers?

A. Yes and no.

Q. Let us get a period of time——

A. Mr. E. T. Allen called to see him.

Q. E. T. Allen?

A. Yes, several times. He is dead. You will think nearly everybody is dead,—Mr. C. W. Clark was a great friend of his and he came to
465 see him quite often, and Mr. Newman, who is also dead,—Mr. Simon Newman.

Q. Simon Newman?

A. Yes.

Q. Now, you are speaking after the period he was first taken with this attack of gout——

A. Yes, and his cousins and relatives came up from Gilroy to see him.

Q. His relatives,—cousins, came; what were their names?

466 A. Mrs. S. W. Sheldon.

Q. Mrs. S. W. Sheldon.

A. Mildred Sheldon, who is now Mrs. Cornett, came to see him, Paul, and a great many of my friends. Mr. Carey of Oregon, Judge Carey of Portland.

Q. When was it that Judge Carey came to see him?

A. I haven't the slightest idea.

Q. Can't you place it?

467 A. Let me see. I do not know whether it was 1913——

Q. Was it before you went to Europe or after you returned?

A. That is what I cannot tell you.

Q. You cannot fix it within a year?

A. No; I came back from Europe in 1912.

Q. About November?

A. November, 1912; Judge Carey came in 1913.

468 Q. 1913; in the spring of the year,—summer, fall or what portion?

A. I haven't the slightest idea; I think some time in the summer because I judge that from his daughter visiting us.

Q. By the way, Mrs. Nickel, this may help you fix the date,—do you recall the incident of the execution of the will and trust deed that is involved here?

A. Yes, that was in April.

Q. Now, was it before that or after that?

469 A. I could not tell you.

Q. Had Judge Carey been the acquaintance and friend of some considerable period of time?

A. No,—father was very anxious to see him.

(Witness temporarily withdrawn.)

EDWARD FRANK CAMPBELL,

called, sworn, testified as follows:

470 Mr. SULLIVAN. What is your name, please?

WITNESS. Edward Frank Campbell.

Q. Where do you reside?

A. Number 1011 O'Farrell street.

Mr. SULLIVAN. May it be stipulated, Mr. Treadwell, that Mr. Campbell may be excused?

Mr. TREADWELL. That is satisfactory to me; what time?

Mr. SULLIVAN. Until three o'clock tomorrow, Friday.

471 Mr. TREADWELL. That is satisfactory.

DAVID BROWN,

called, sworn, testified as follows:

Mr. SULLIVAN. What is your name, please?

WITNESS. David Brown.

Q. And your place of residence?

A. Alameda.

Q. The specific place in Alameda?

472 A. 1024 Grand street.

Q. Are you connected in any way with the corporation known as Miller & Lux?

A. Miller & Lux, Incorporated.

Q. Yes, Miller & Lux, Incorporated.

A. Yes.

Q. What is your connection, if any?

A. Secretary.

Mr. Sullivan. Might it be stipulated at this time, Mr. Treadwell, that Mr. Brown be excused
473 until 3:30 tomorrow afternoon?

Mr. Treadwell. That is satisfactory.

Mrs. Nellie Miller Nickel,

recalled:

Mr. Benjamin. Q. By the way, Mrs. Nickel, do you remember who the chauffeur was that you had during those periods,—you have just been
474 testifying to when your father went motoring?

A. Henry Agard.

Q. He is the same chauffeur you have now?

A. Yes.

Q. You have had him ever since?

A. Yes, had him before; I mean to say that he was chauffeur with Mr. Miller when he went on his trips to the country.

Q. Well, he has been with you since 1906 or even before the fire?

A. Yes, before that,—1903, I think, or 1904.

475 Q. Was he always the one who took you out on the trips?

A. No, sometimes we had his father.

Q. Who is the first physician that was employed by your father at the time that this attack came on?

A. Dr. Herzstein.

Q. Did he have other physicians?

A. Dr. Herzstein, and then Dr. Herzstein had called in Dr. Thorne.

476 Q. Dr. Thorne?

A. He is dead, but I can tell you some others who are not dead,—Dr. Moffitt.

Q. Herbert Moffitt?

A. Dr. Moffitt, and Dr. Shiels,—they were simply called in consultation.

Q. Dr. J. Wilson Shiels?

A. Yes.

Q. Dr. Kerr?

A. Yes, Dr. Kerr.

477 Q. When were they called in consultation?

A. They were called the first time, I think, in 1910, towards Christmas, or the spring of 1911, I do not know which.

Q. That is, Dr. Herzstein was the regular attending physician?

A. Yes.

Q. And he called in consultation at that period of 1910, in the fall, or spring of 1911, Dr. Moffitt and Dr. Shiels,—did I understand Dr. Shiels—Dr. Thorne, who is now deceased?

478 A. No, never Dr. Shiels.

Q. Never?

A. No; Dr. Kerr and Dr. Thorne and Dr. Moffitt.

Q. That is Dr. Herbert Moffitt you are speaking of?

A. Yes.

Q. And upon how many occasions were the consultations between the physicians with respect to your father at that time?

479 A. Not more than twice.

Q. Not more than twice. What was his condition at that particular time, as you recall it?

A. Well, he had quite a bad attack. Dr. Herzstein, to satisfy himself, called in these doctors.

Q. What was the character of the attack?

A. I am sure I do not know.

Q. I am trying to make it specific. Was it similar in character to the attack that he had

480 in Gilroy at one time?

A. No.

Q. Not like that?

A. He never had any attack at Gilroy.

Q. Did he have an attack of some kind at Gilroy?

A. An attack of gout.

Q. Was there one occasion in Gilroy, along in 1911 or 1912, when he had some sort of an attack there and came home in the charge of a physician?

481 A. No.

Q. Don't you recall that he had an attack?

A. No, he never came home in charge of a physician.

Q. That may have occurred in 1912, when you were abroad?

A. He came home because he was angry.

Q. No; in 1910. Do you recall anything in 1910?

A. That was when he had the doctors, when
482 the consultation was had.

Q. Yes.

A. In 1910, or early in 1911,—oh, I know, he had oedema.

Q. Oedema?

A. Swelling of the legs.

Q. Was it with respect to that condition or other complications or other matters that he was enduring at that time that the consultation was called of physicians?

483 A. Yes.

Q. And you say that was in 1910?

A. Either late in 1910 or early in 1911.

Q. There were two or three consultations?

A. Not three; there was one,—there might have been two.

Q. There might have been two?

A. Not any more than two; that is my recollection.

Q. Was his condition at that time such that the physicians prescribed any character of stimulant for him?

484 A. No, he never took any stimulant, excepting sedative.

Q. He was troubled with insomnia?

A. No, he was not troubled with insomnia, excepting—father,—I do not know what kind of a witness I make—when he was well, Mr. Benjamin, he went to bed very early, eight o'clock, and he would get up say about half past four or five, have his breakfast, then start out. Of course, when he was in the city he was not able
485 to go out, and did not sleep so well; yes, he was given a stimulant, because strychnine is a stimulant.

Q. You are thinking of liquors?

A. Yes.

Q. No, stimulant in the form of medicinal stimulant.

A. Yes, but not much.

Q. As prescribed?

A. Yes, but after the consultation was over
486 and father was better, we went right back to Dr. Herzstein's medicines, which was simply feeding him well and seeing that he had rest.

Q. As a result of the consultation that you have mentioned, they treated your father and prescribed for him, not only the stimulant of strychnine but they also gave him a sedative to induce sleep, to give him rest?

A. Yes.

Q. How long did that character of treatment prevail,—how long did they maintain it, keep it up,—do you recall?

487 A. No, I do not know. I never knew what they gave him; I know what Dr. Herzstein gave him.

Q. What did he give him?

A. When father had bronchitis, they gave him medicine for bronchial trouble; he always had bronchitis; then he gave him strychnine, I think twice a day, and then he had veronal.

Q. Veronal?

A. Yes.

488 Q. How long was it,—as a matter of fact, Mrs. Nickel, that treatment continued right along?

A. Yes, until before he died; then they gave him morphine.

Q. Was there any other time that Dr. Moffitt was called in after that particular consultation that you have mentioned in 1910?

A. Once afterwards, I think.

Q. And do you recall when it was, about

489 when?

A. No, I haven't the slightest idea.

Q. After you returned from abroad?

A. Yes.

Q. During—very shortly, or some time afterwards—have you some way of placing it?

A. No; I think it was either late in 1913, or 1914.

Q. By the way, Mrs. Nickel, were you present at the time the trust deed was executed?

A. Yes.

490 Q. Was that done at home?

A. Yes.

Q. Not in the office?

A. No.

Q. Well, if it would be possible for you to recall the situation,—after you got back from abroad, which was about November, 1912—what was the—was your father practically in the same physical condition?

A. Just exactly the same, Mr. Benjamin.

491 Q. No improvement?

A. Just the same,—no, he was able to walk, he walked very well.

Q. Was he still suffering from the same condition?

A. No, not as much.

Q. Not as acute?

A. No, not nearly as acute, because he wore his shoes.

492 Q. He was able to walk?

A. Yes, he walked up and down stairs to the dining room.

Q. At home?

A. Of course, we put in an elevator.

Q. When did you put in this elevator?

A. We put in the elevator late in 1912.

Q. Late in 1912?

A. Yes, well, in the fall of 1912.

Q. Was that done prior to your return from Europe?

493 A. The house was made—the alterations were started before I left and finished when I returned.

Q. The elevator was installed in the house by reason of the necessity of taking your father down stairs?

A. Yes, because the stairs are very steep; they are very steep. He always walked from his sitting room to his bedroom; he walked the length of the house, back and forth.

494 Q. On the one floor?

A. Yes.

Q. His rooms were on the second floor?

A. Yes.

Q. It was some time during the absence in Europe that the elevator was put in?

A. Yes sir.

Q. As a matter of fact, Mrs. Nickel, it was an accommodation to him?

A. Yes, sir.

495 Q. After your return from abroad, did your father visit the offices down in the Merchants Exchange with you at any time?

A. I never went to the office with him, but he went to the office, but I never went with him.

Q. Have you any recollection of how frequently or infrequently he might have gone there? As a matter of fact, it was an infrequent thing for him to go down to the office at all?

A. Yes. Of course it was very inconvenient for him to go on account of the elevator and walk,

496 because it was quite a long distance from the elevator to the offices.

Q. When was the first time that the making of a will was mentioned, Mrs. Nickel?

A. I haven't the slightest idea.

Q. Do you recall approximately, the time that it was first mentioned; was it prior to the time that you went abroad, or after you returned, that the matter of making a will was mentioned?

A. I do not remember, Mr. Benjamin.

497 Q. And the deed,—the making of the trust deed,—when was that spoken of?

A. Mr. Miller never mentioned it to me; he never discussed business with me.

Q. When did you first learn of his executing the will?

A. When he made it.

Q. On the day he made it?

A. Yes, on the day, or a couple of days before.

498 Q. You did have some knowledge of his intention to execute a will and deed prior to the day he did it?

A. Yes, sir.

Q. But not more than a day or so?

A. No, because I do not think he ever discussed it.

Q. He discussed the purposes to which he intended to devote his fortune?

A. Yes,—his charities.

499 Q. And when had he discussed those matters with you?

A. Only a very short time before, because I never knew anything about it.

Q. I wonder if we have made mistakes in dates; are you positive that it was in 1912 you went abroad; wasn't it 1913?

A. No.

Q. Did you go abroad in 1913 also?

A. No. I went in the year my daughter
500 graduated,—in 1912.

Q. I was thinking it was in 1913,—I was thinking of something in connection with 1913. You did not make another trip abroad?

A. No, I have never been out of the state since.

Q. At the time that—so far as your independent recollection is concerned, you recall distinctly the time when the will and the deed were executed,—the date?

501 A. Yes.

Q. I assume that they were,—that the documents were brought to the house by your husband, or by Mr. Treadwell, or by someone connected with the business?

A. Mr. Treadwell.

Q. And you were present at the time your father signed them?

A. I do not know whether I was or not,—let me see. I was, I think I was present when he signed either the will or the trust deed.

502 Q. Do you recall the reading of the document to your father?

A. Yes, because I read it to him.

Q. You read it to him?

A. Afterward.

Q. Before he signed it?

A. No, I do not know whether I did or not; I heard the reading of it.

Q. Before he signed it?

A. Yes.

503 Q. Do you recall who read it to him at that time?

A. No.

Q. Who were the parties present at that time?

A. Miss Jensen signed, and Mr. Campbell signed, Mr. Mason signed; I think I must have been present.

Q. Mr. Mason is a notary,—that you speak of?

504 A. Yes.

Q. Was Mr. Treadwell there?

A. Yes.

Q. Was your husband present?

A. No. I know father read it.

Q. Did he read it himself or was it read to him?

A. It was read to him and he read parts of it.

Q. Was Miss Jensen in the room during the time it was read to him, or was Mr. Campbell,

505 the nurse, in the room during the time it was read to him?

A. No.

Q. Were there two documents or one document, as far as your recollection goes?

A. To tell the truth, I haven't the slightest idea.

Q. You do not remember?

A. No.

Q. Do you remember Mr. Mason signing

506 something?

A. Yes.

Q. Do you remember Miss Jensen signing something?

A. Yes.

Q. At the same time your father signed?

A. Yes.

Q. And what did your father say about the matter at that time?

A. He never said anything to me at all; he

507 asked me if I was satisfied, and I said, "Yes."

Q. You had read the document yourself prior to the time he signed it?

A. I think I read it at the time it was read to father, when he looked over it and read it himself.

Q. Where had you first seen the document that he asked you if you were satisfied—where had you first seen it?

A. At the time he signed it.

Q. At the time he signed it?

508 A. Yes.

Q. Had you read it yourself prior to that time,—and you do not remember who read it to your father?

A. No, I think either Mr. Mason or Mr. Treadwell; I know father read it himself; he did not read all parts of it.

Q. Did he read it out loud?

A. No, to himself,—and several times afterwards.

509 Q. After it had been executed?

A. Yes.

Q. Where, or in what manner did you get your knowledge of the contents of the document or documents, prior to the time that your father asked you if you were satisfied—that is what I am trying to find out.

A. I had no knowledge of it at all; I had never read it; I am a very poor business woman, Mr. Benjamin.

510 Q. Had your father discussed with you, aside from charity matters, what he had intended to do with his money?

A. No, sir.

Q. At any time?

A. No, sir.

Q. Had he indicated to you at any time anything about his intentions with respect to any particular bequests to individuals, or anything of that kind?

A. I do not understand you.

511 Q. In his discussion with you relative to a will and trust deed,—in these discussions with you had he indicated to you any information that he may have had with respect to particular personal bequests?

A. No; excepting the hospital at Gilroy.

Q. That matter had been a subject of discussion by your father for some time?

A. Yes.

Q. There had been—Gilroy people had called
512 upon him to discuss the matter with him?

A. They had.

Q. And somewhat to his annoyance?

A. Very much so.

Q. Do you remember just about when it was they called on him?

A. No, Mr. Benjamin; I did not go with father on his trips before he was ill; I would be at the ranches when he was there, but I did not make any trips with him.

513 Q. At the time,—during the year, the winter of 1912, you were constantly at home?

A. Yes.

Q. And your father was under the care and attendance of the same nurses that you have mentioned, and Dr. Herzstein?

A. Yes.

Q. And that was the same condition—he was in the same condition all the time, Mrs. Nickel, as a matter of fact?

514 A. Yes. Father only wanted to have one nurse; I wanted two nurses because I wanted father to have every attention.

Q. On the day that the will was executed and the trust deed was executed, you recall the day and the incident—were the documents brought to the house by Mr. Treadwell in the morning or afternoon, Mrs. Nickel?

A. I think in the morning.

Q. In the morning. Do you recall what time
515 in the morning?

A. I haven't the slightest idea, because I did not take any interest.

Q. Did you know that Mr. Treadwell was coming to the house at that time, for the purpose of bringing these documents to your father?

A. Yes.

Q. From whom had you learned that Mr. Treadwell was coming to the house to bring the will and deed?

516 A. Father.

Q. From your father. Why, had he told you that such was Mr. Treadwell's purpose in coming there that day?

A. I am sure I don't know. He told me that he was coming to the house and he was going to make his will and a deed.

Q. Do you remember when it was he told you that, for the first time,—was it the morning of that day,—do you remember,—for the first time?

517 A. I haven't the slightest idea, because it was never discussed with me.

Q. Had Mr. Treadwell been to the house frequently prior to that time?

A. Just on matters regarding legal affairs.

Q. But you had no knowledge, prior to the arrival of Mr. Treadwell with the papers himself, prior to that day, that your father was contemplating the execution of either a will or deed?

518 A. Yes; father told me a few days before.

Q. Oh, he had?

A. I mean to say that about the contents,—the only thing I knew about the will, I knew that,—I knew his charities.

Q. Well, then, as I understand you, Mrs. Nickel, some few days before he did execute the will and the deed you were advised that he intended to do so?

A. Yes.

519 Q. Did you know the form he intended to dispose of them in; had he said anything to you about the trust deed or will,—what was it he said about it?

A. That is what I cannot tell you.

Q. What did he say about the matter,—what was the conversation with you, in which conversation you found he intended to make some disposition of his property; what was it he said; what is your best recollection on the subject?

520 A. If you knew how little I know about business, Mr. Benjamin, you would not ask such questions.

Q. This is not really about business,—simply your recollection of the conversation; that you must remember.

A. I should say he wanted to have his things settled and be done with it.

Q. Do you remember what he said?

A. I could not swear to that at all, because
521 as I say, father never discussed his will, excepting his charities.

Q. Had your father come to the conclusion that it was about time to get his affairs in shape and get everything settled?

A. Yes, but he had the stenographer that day, or either went motoring; that is what I do remember, because I was surprised at his having this business and going out.

Q. He was despondent over his illness?

522 A. No, because at one time he wished to have one of his nurses leave, even within three weeks before his death he thought he was going to get well, and it was only just before he was taken ill in July he wanted to go to San Joaquin.

Q. In July of what year?

A. In July this year.

Q. This year. The spirit was strong although the flesh was weak, was it?

A. Yes.

523 Q. Let us get back to this time, because I do not want to bother you too much,—I must get your best recollection in respect to the time this deed was executed, and the will. You discussed the matter of the disposition of his properties with your father about that time?

A. No, I did not,—no.

Q. Well, don't misunderstand me, Mrs. Nickel. He mentioned to you what he was going to do,—he was going to do something?

524 A. Yes.

Q. And practically advised you and told you that he had made up his mind to make some disposition thereof?

A. Yes.

Q. In other words, when Mr. Treadwell arrived with the will,—these deuments,—it was no surprise to you?

A. No, of course not.

Q. You had not any exact knowledge of just

525 what your father was going to do with his estate, but you knew that he was going to do something?

A. Yes.

Q. Did you know the form in which he was going to dispose of it? Do you know why he executed the will and the deed?

A. No, sir.

Q. Did he ever say anything to you about making a will?

A. He never mentioned it to me.

526 Q. Did he ever state to you that there was any reason or particular purpose in the execution of both a will and a trust deed?

A. He was going to pay,—father said he had to pay a tax.

Q. An inheritance tax?

A. Yes.

Q. And did he say at any time that the execution of this deed had anything to do with the payment of the tax?

527 A. No, sir.

Q. How did it come about that he mentioned the payment of inheritance tax?

A. Because I suppose everybody had to pay an inheritance tax.

Q. What was it he said about that particular subject?

A. It made no impression on me at all. As I will tell you very frankly, the discussion of a will was something that Mr. Miller never had

528 anything to do with me. He asked me if I was satisfied, and I said "yes."

Q. Well, that was after he had made it?

A. After he made it.

Q. And when was it that he mentioned this matter about the tax; about the same time?

A. That is something I could not tell you.

Q. Do you recall when it was that this discussion occurred?

A. No, sir.

529 Q. Was he in bed at the time he executed this will?

A. No, sir.

Q. Where was he?

A. In the sitting room.

Q. Up stairs?

A. Yes, sir.

Q. And dressed at the time?

A. Yes, he was up and dressed every morning. He breakfasted at 7 o'clock.

530 Q. Were the nurses present at the time the document was read to him?

A. No, sir.

Q. How did they happen to come into the room,—who sent for them?

A. I suppose they were sent for.

Q. Did you send for them; had Mr. Treadwell sent for them; how were they called in?

A. I think I must have called them in.

Q. And was there any explanation made to
531 them, or statement made to them by Mr. Miller, or yourself, or Mr. Treadwell, as to what the documents were?

A. That is something I cannot tell you.

Q. Can you remember,—did your father speak to them, say anything to them at all?

A. I haven't the slightest idea.

Q. You were present at the time?

A. Yes.

Q. Have you no recollection of anything whatever?

532 A. None whatever. Unless he might have said it was his will,—he probably did say it.

Q. I am asking for your personal knowledge and recollection.

A. But I haven't any recollection.

Q. You are only assuming that he said it?

A. Yes.

Q. You have no recollection of any statement made by him to any person at that time?

A. No.

533 Q. But he did ask you if you were satisfied?

A. Yes.

Q. Had you read the entire document yourself at that time?

A. Yes, because it was read at that time.

Q. How many documents did you read at that time?

A. Two—I do not know.

Q. By the way, Mrs. Nickel, did your father tell you,—speaking of the inheritance tax and tax matter—did your father tell you that the 534 legislature of California was raising the rates that year; did he say anything about that?

A. No.

Q. Do you recall the fact that he had been advised by his attorney that the rates of inheritance tax were being raised that year by the legislature?

A. I am sure I do not.

Q. Did you know that of your own knowledge?

535 A. Not at that time.

Q. You did know subsequently?

A. Yes.

Q. When did you first learn it?

A. When did the legislature meet?

Q. They met in January, prior to the execution of this deed.

A. No, I did not know, because I never discussed it. I never read the papers, very seldom, never read about the legislature.

536 Q. Now, the deed or will were made in April——

Mr. Treadwell. The 27th of April.

Q. The deed and will were made the 27th of April, 1913?

A. Yes.

Q. You did learn sometime thereabouts that there had been or would be an increase in inheritance tax rates?

A. Yes, but what it was I did not know; I
537 do not even know now.

Q. But you did learn that fact about that time? Of the increase in the inheritance tax rates?

A. About that time.

Q. Were you present at any conversations between your husband and your father with respect to the execution of this trust deed and will at all?

A. No, sir.

Q. And I understood you to say Mr. Nickel was not present at the time it was executed?

538 A. No, sir.

Q. Did you have any conversations with your father subsequent to the execution of the will and trust deed concerning the same?

A. Only the charities.

Q. Only with respect to the charities. After the will and the deed were executed what became of them,—do you remember?

A. They were put into the safe deposit box —I do not know where it is,—at the Mercantile
539 Trust Company.

Q. Did you put them there?

A. No, I did not.

Q. You were merely informed that they were there?

A. I knew they were there because I took them out.

Q. Perhaps I did not make myself quite clear. When your father made the will and the deed on the 17th day of April, 1913, after he had
540 signed them and they were witnessed by Mr. Mason and Mr. Mason departed and the nurses went out of the room, and Mr. Treadwell was there and you were there; I assume that it is a fact that they were turned over to Mr. Treadwell to take care of them and he took them away?

A. Yes.

Q. And they remained there until they were taken out of the safe deposit vault?

A. Yes.

541 Q. When?

A. I do not remember, but father wanted to see them and I took them up to the house.

Q. When was that?

A. I haven't the slightest idea.

Q. Can you give us approximately?

A. No.

Q. The same year?

A. No. Not that year. This is 1916,—either in, it must have been in 1915.

542 Q. During the time of the exposition?

A. Yes, because it was only about a year ago, because he asked me to get them and I did and he read them and then I read them to him.

Q. What became of them,—by the way, did you mention the Mercantile Trust Company?

A. Yes.

Q. On California street?

A. Yes, sir.

Q. In his safe deposit box?

543 A. Yes.

Mr. Treadwell. Just listen to the question, Mrs. Nickel.

Q. Did you have the key to the box?

A. Yes.

Q. From his keys?

A. Yes.

Q. He gave you the key to the box?

A. Yes.

Q. To get the trust deed and the will?

A. Yes.

544 Mr. Treadwell. I do not think you understand the question, Mrs. Nickel.

Q. You were sent to get the trust deed and the will by your father?

A. Yes.

Q. He wanted to see them?

A. He did.

Q. Now, where were the will and trust deed?

A. In the safe deposit box.

Q. Yes,—at the Mercantile Trust Company?

545 A. Yes.

Q. And the box,—how did you get into the box?

A. I had the key.

Q. And from whom did you get the key?

A. I had the key myself.

Q. Whose box was it?

A. I could not tell you,—it was a safe deposit,—but I do not know in whose name it was, or anything of the kind.

546 Q. Was it a box that you yourself had personally rented?

A. No.

Q. Where did you get the key?

A. Mr. Nickel gave me the key.

Q. Mr. Nickel. And you did not get the key of that particular box at that time from your father?

A. No.

Q. I did not want to mislead you, Mrs. Nickel. You had received the key of this box from your

547 husband, Mr. Nickel, and had possession of the key?

A. Yes.

Q. I assume that Mr. Nickel had a key also, —is that correct?

A. Yes, sir.

Q. When your father asked you to get the will and trust deed, did he at that time know where they were?

A. Yes.

548 Q. And had they been placed in this box at his request?

A. They had.

Q. And you went and opened the box, got the trust deed and will and brought them to him?

A. Yes.

Q. How long did he keep them at that time?

A. Oh, he kept them two or three hours; he read them and I read them to him.

549 Q. That was in 1915?

A. 1914 or 1915, I really do not remember, Mr. Benjamin, but I think it was early in 1915.

Q. Did you return the will and the deed to the box the same day, or the subsequent day?

A. The same day.

Q. The same day. You recall that distinctly, do you?

A. Yes, I recall it distinctly.

Q. Did he make any change in either the will or the deed?

550 A. He did not.

Q. Did you ever get the will and the trust deed from the box again for his inspection?

A. No.

Q. Did he ever ask for them again?

A. No.

Q. Were they ever in his hands again, that you know of?

A. No.

Q. Did he have any other property or documents that you kept for him in the same box?

551

A. No.

Q. Did he have any other papers—where did he keep his papers, by the way?

A. If anybody knows that they know more than I did. Mr. Miller could not find them himself a great portion of the time.

Q. Where were the stock certificates of Miller & Lux kept, do you remember?

A. No, I never had anything to do with busi-

552 ness.

Q. Did you ever see any of these certificates of Miller & Lux?

A. I have seen what dividends I get from the Miller & Lux Co.

Q. Yes; I was referring to the certificates of stock themselves,—where did your father keep them, his certificates of stock,—do you remember?

A. I did not know.

553 Q. At the time that the deed was made by your father, did he have certificates at the house?

A. I do not know.

Q. Did you ever see them?

A. Never.

Q. And have you ever seen them since?

A. No, I have never seen them.

Q. Didn't he at the time he executed the trust deed, didn't he at that time endorse the stock
554 certificates at the same time and turn them over to Mr. Treadwell?

A. I do not know; the only thing I knew about was the will and trust deed; nothing else.

Q. The only two pieces of papers or two documents that your father had there at that time Mr. Treadwell brought there,—they were the will and trust deed; that is all he signed?

A. That is all I saw.

Q. Did he sign his signature more than twice?

555 Mr. Treadwell. You mean did she see him sign.

A. I saw him sign twice. Of course, the will meant nothing to me, one way or the other.

Q. The will?

A. The will or trust deed. The only thing I objected to was some of his charities.

Mr. Benjamin. Mr. Treadwell, if there is no objection, the direct examination will be temporarily suspended.

Mr. Treadwell. Very well, Mr. Benjamin.

556 Cross-examination.

Mr. Treadwell. This is not very important, Mrs. Nickel, but I want to get it correct,—you said something about timber land in your direct examination.

A. I do not know the difference between timber land and any other kind of land.

Q. This land is generally agricultural land?

A. I haven't the slightest idea. I know father owned some land. I have heard him
557 speak very bitterly about it, San Jacinto, I think,—where is that?

Q. Well, it is not important, anyhow. I did not want any misunderstanding. Now, Mrs. Nickel, you referred to the gouty condition of Mr. Miller; was he troubled with gout before the time that you refer to as an attack of gout?

A. Just once, when he went to the springs and stayed there two weeks.

558 Q. What I mean is, any attack, did he have what you call rheumatism, or gout, in his feet before that?

A. Just that time.

Q. Just the one time?

A. You know what trouble father did have with his feet.

Q. That is what I am trying to get at,—he was troubled with his feet before that time?

A. He was troubled with his feet,—from callouses.

559 Q. How long a time had he been troubled with his feet before the time you refer to in 1910, when he had this attack?

A. I think he had it off and on about two years, but never seriously.

Q. So it had been a rheumatic condition?

A. A gradual condition——

Q. A rheumatic condition?

A. A rheumatic condition caused by food he ate and shoes he wore.

560 Q. Now, as to your father's physical condition generally,—I mean his physical build,—was he a man of sturdy, robust physique or otherwise?

A. Very strong.

Q. He was an extraordinarily strong man?

A. Yes.

Q. Was he a man that could stand a good deal of exposure and fatigue?

A. He could; he could travel from five o'clock
561 in the morning until nine o'clock at night, without anything to eat.

Q. And was he accustomed to making trips of that kind clear up until as late as 1910?

A. Yes.

Q. Do you know how far he traveled even the day before he had this gouty attack?

A. Seventy miles after sunset.

Q. After sunset. Now, during the time that you have covered by your testimony, outside of the one or two attacks that you refer to, was your father accustomed to dress daily?

562 A. Yes.

Q. And when he was in the house he walked around the house?

A. Always; he always did; until he had the motor he walked to the office from 34 Essex; he walked to and from the office, and afterwards took street cars and walked, excepting after he had trouble with his feet.

Q. And how long before your father's death did he continue to dress and be around the

563 house?

A. Well, he walked,—he motored, he went to the fair all the time during the fair, and he went to the fair after it was over,—after they tore down the buildings,—once, I think, and he motored up to the end of July.

Q. 1916?

A. 1916.

Q. By the fair, of course, you refer to the great fair of 1915?

564 A. Yes.

Q. Now, then, after July, after he quit motoring, how long did he continue to dress and be around the house?

A. Well, that was in July, he had bronchial pneumonia, and he was confined, I think, to his room probably three weeks, and the weather was bad and the doctor wanted him to go in the other room because he said he was perfectly able to go into the other room, from the sitting room into the bedroom, and from the bedroom into the sitting room; he nearly always had his

breakfast in the sitting room until the time he was last taken sick.

Q. How long would that be before his death?

A. Well, I should think about three weeks.

Q. So that he was dressed and around the house until something like three weeks before the end?

A. Yes.

Q. You have referred to two nurses being assigned to take care of Mr. Miller; was that for the purpose of having a day nurse and night nurse?

A. Yes; that was because I wanted it.

Q. The Arrowhead Springs that you mention you went to are down near San Bernardino?

A. Yes.

Q. That is the place you refer to?

A. Yes.

Q. In regard to the office at the Merchants Exchange Building,—is it not a fact that the office is at the extreme northeast corner of the building?

A. It is the extreme end of some place.

Q. Extreme end of something. And the toilet arrangements in that building are on entirely different floor,—are they not, as you understand it?

A. Yes, on the eighth floor.

Q. On the eighth floor. Now, I want to direct your attention, Mrs. Nickel, to the time that

568 this deed of trust and this will were executed. Did you have any real knowledge before that time that Mr. Miller had made prior wills at other times before that occasion?

A. Yes.

Q. In a general way, how many years back would that be true as to?

A. I could not tell you that.

Q. You cannot remember yourself when you had any knowledge of his making a first will?

569 A. No, I know the will was exactly, always exactly the same.

Q. You did understand, then, that he had made a will at earlier times?

A. Yes.

Q. Could you give me any definite time as to how early you had general information to that effect?

A. The only time I heard,—the first time I heard of Mr. Miller making a will was at the

570 time Mr. Mastick was alive.

Q. During the time Mr. E. B. Mastick was alive?

A. Yes.

Q. And Mr. E. B. Mastick died in 1904, before the fire some time?

A. Many years ago.

Q. Maybe long before that,—that is your best recollection?

A. Yes.

571 Q. Now, you were not asked to be a witness to that will, were you, Mrs. Nickel?

A. No.

Q. But you were present in the house on that day?

A. Yes.

Q. Do you know whether or not the draft of the will was seen by your father and also the draft of the deed of trust seen by him before the day it was executed?

572 A. I do not know.

Q. You do not know anything to the contrary?

A. No.

Q. So when that particular morning, when Mr. Mason and myself came out there to formally execute the will and the deed of trust, you do not mean to convey the impression that that was the first time Mr. Miller had seen it, as far as you know?

573 A. No, I suppose he had seen it, but you know I never took any interest in it.

Q. You know that I had been to the house on other occasions?

A. Yes.

Q. But you were not present at those conversations?

A. No.

Q. Now, you say you remember these instruments being read to Mr. Miller, and you also say that you remember seeing him read them himself?

574 A. Yes.

Q. Have you any definite recollection as to whether it was actually read to him at the time it was executed on that particular day?

A. Yes.

Q. Well, what I mean is this—I want to get your memory just as clear as I can. Now, on the day it was executed,—I am directing your attention to, for instance, while Mr. Campbell was there, he was a witness to the will,—now,
575 do you mean the will was read to Mr. Campbell?

A. No.

Q. So it was not read in the presence of Mr. Campbell?

A. No.

Q. And it was not read in the presence of Miss Jensen?

A. No.

Q. Neither was the deed of trust read in their presence?
576

A. No.

Q. Have you any recollection as to whether it was read in the presence of Mr. Mason?

A. No, I have not, because, as I say, I did not take any interest in it.

Q. You do not mean to testify that those documents were read at that particular time, while Mr. Mason and I were there that morning, do you?

A. I am sure I do not know.

577 Q. In other words, you know they were read to him at some time?

A. I saw him read them afterwards.

Q. You saw him read them?

A. Yes.

Q. Calling your attention to the deed of trust itself, Mrs. Nickel, I show you the last page of it which contains the following words: "We, the undersigned trustees appointed by the foregoing deed of trust, hereby accept said trust
578 on the terms therein set forth. Dated: April 17, 1913, Nellie Miller Nickel, J. Leroy Nickel, trustees", and acknowledged by you and Mr. Nickel before Mr. Mason,—now, is that your signature, Mrs. Nickel?

A. Yes.

Q. Do you remember signing that?

A. Yes.

Q. You also recognize the signature of Henry Miller on that page before you?

579 A. Yes.

Q. And do you remember acknowledging that before Mr. Mason at that time?

A. Yes.

Q. And then, as you say, you turned it over to me?

A. Yes.

Q. Now, you have referred to a safe deposit box. There is a safe deposit box in the Mercantile Trust Company for which you have a key?

580 A. Yes.

Q. And it is your information that Mr. Nickel also has a key?

A. Yes.

Q. Do you know when you first rented that box?

A. Yes, we rented it in April, 1913.

Q. So it was rented for the purpose of putting this deed in it, was it not?

A. Yes.

581 Q. Is it the best of your information that this deed was placed in this box?

A. Yes.

Q. And had you a key?

A. Yes.

Q. And Mr. Nickel had a key?

A. Yes.

Q. Did you ever know of Henry Miller having a key to it?

A. No.

582 Q. Now, after Mr. Miller's death, was that deed of trust still in the box?

A. Yes.

Q. Did you go to the box and get it out?

A. No.

Q. You went there and saw it in there?

A. I saw it in there, but I did not take it out.

Q. I think that is correct. Now, is there another safe deposit box in that same safe deposit company that the firm of Miller & Lux rents?

583 A. I do not know.

Q. You do not know anything about that?

A. No.

Q. But the papers you took out the time you went to get the deed of trust to show to Mr. Miller,—was that the deed of trust that was in your box?

A. Yes.

Q. You did not,—did you mean to say that the will was also in that box?

584 A. I do not know.

Q. You do not have any recollection of seeing the will in that box, in your box?

A. I really do not know what I took up to the house. I do not know whether it was the deed of trust or the will.

Q. Now, you stated that your father told you that he would have to pay an inheritance tax. Did he indicate that he would not have to pay it or that he intended to avoid paying it?

585 A. No, he expected to pay an inheritance tax.

Q. Now, your trip to Europe you say was made during the year 1912, as I remember it?

A. Yes. I cannot—I believe it was the year Beatrice graduated, and I am sure I know it was 1912.

Q. I know you are right.

A. I do not want to tell an untruth.

Q. You went and took your daughter, did you?

A. Yes.

586 Q. And what was the general purpose of the trip?

A. I went because Beatrice had finished school and wanted the trip, and I had not been feeling particularly well, and the doctor thought it would be a very good change for me,—that is why I went.

Q. You would not have gone if you had imagined that your father might die?

A. I asked the doctor and he told me to go
587 and stay as long as I wanted to.

Q. You also remodeled the house to a considerable extent during that period, didn't you?

A. Yes; that was May,—the house—they commenced to remodel the house in April; father was there all the time excepting the time he went to Gilroy and Mount Madonna.

Q. And the purpose of putting in the elevator was, you say, largely to accommodate him, so he could go up and down stairs?

588 A. He went down to luncheon; he went up stairs, and went out motoring; as I say, the stairs are very steep.

Mr. Benjamin. Was your father in the habit of coming down stairs to all meals, Mrs. Nickel?

A. He came down, not to all—he had breakfast at seven, and then came down stairs for lunch, and then Christmas and Thanksgiving, he came down for dinner, but that was much earlier.

589 Mr. Nickel. Not later. Her answer would imply that he had been in the custom of always coming down.

Mr. Treadwell. Q. And how long did he continue to come down stairs to meals?

A. Father had his lunch down stairs as late as 1913.

Q. After that he had his meals up stairs?

A. Yes.

Q. In the sitting room?

590 A. Always in the sitting room.

Mr. Treadwell. I think that is all I care to ask Mrs. Nickel, Mr. Benjamin, unless something develops.

Re-direct Examination.

Mr. Benjamin. Just a few minutes and we can finish. I just want to ask you a few little questions, Mrs. Nickel. In your direct examination you mentioned the fact that quite a num-
591 ber of your friends or, several of your friends, seeing and talking to your father.

A. Yes.

Q. Would you give us their names?

A. Miss Garrett would go in, just to say "how do you do." My daughter was there, my grandson, I mean my son.

Q. Miss Garrett lives here in San Francisco?

A. Miss Carey; Miss Isabel Tyson, from Knoxville, they would not get into have any conversation with him because father took no in-

592 terest in the social doings of the girls, but they would go in, the children would go in and talk to him. But I think it should be said that the trouble father had in talking, on account of having bronchial trouble——

Q. What ones of his employees or of the employees of Miller & Lux were in the habit of coming to visit your father?

A. He saw Mr. Merritt, Mr. Brown, Mr. Gilcrest of Nevada, Mr. Adams, Mr. Rodolph——

593 Q. Those were men who were upon the properties,—some of them—Mr. Merritt, of course, was in the office?

A. Yes.

Q. Some other men?

A. Mr. Gilchrist was manager of the Nevada properties.

Q. What was the date of the last visit if you can recall, Mrs. Nickel, approximately, that any of the employees of Miller & Lux, outside of men

594 connected directly with the office in the Merchants Exchange Building, visited your father?

A. I think in 1915.

Q. 1915. Do you remember who it was that visited him then?

A. No.

Q. Do you remember when it was that he was visited by any one of them?

A. No.

Q. Mrs. Nickel, is it not a fact that none of the men on the ranches of the firm of Miller &

595 Lux, or any of the employees of Miller & Lux have seen your father to discuss any matter with him since about 19——the summer of 1913?

A. No, I think Mr. Wallis was there later.

Q. Is Mr. Wallis the only one you recall was there later?

A. I do not recall; some of the times I was not in the house. The only thing I remember is that he dictated.

Q. To the stenographer?

596 A. To the stenographer and the superintendent.

Q. But is it not a fact, Mrs. Nickel, that practically since the year of 1912, after your return from Europe, that Mr. Miller had no interviews with the superintendents or foremen of the various properties of Miller & Lux?

A. No, I think he saw them later than that.

Q. Have you any independent recollection of any later visits by any of them?

597 A. Mr. Adams.

Q. Isn't it a fact that Mr. Wallis and Mr. Osborn——

A. Osborn? I don't know anybody by the name of Osborn.

Q. Osgood or Osborn?

A. I don't know anybody by that name.

Q. Ogden?

Mr. NICKEL. We had a man by the name of Ogden.

Q. Isn't it a fact that Mr. Wallis and Mr. Ogden are the only two men connected with the

598 firm of Miller & Lux, outside of the office, except, of course, your husband and Mr. Treadwell, that ever saw your father or talked with him since 1912?

A. I haven't any recollection. Yes, I am sure——

Q. If you are sure, who was it?

A. How in the world can I remember?

Q. You remember these friends of yours?

A. Yes, but my friends were only social

599 friends.

Q. Isn't it a fact that Dr. Herzstein had advised that it would inadvisable for your father to be excited or discuss business?

A. Dr. Herzstein?

Q. He didn't want anybody to bother him?

A. Because he had this terrible attack of bronchitis——

Q. Yes.

A. But he read the newspapers up to the

600 time,—he was reading the newspapers when he was taken ill in July, this year.

Q. It was the practice and object of Dr. Herzstein at all times while he was attending your father, to prevent any undue excitement or bother or annoyance on his part that he could prevent, to protect him against himself?

A. He allowed the stenographer to go up there all the time.

Q. That is the only one he did allow to go up there all the time, is it not?

601 A. I truly cannot remember, but I am sure he saw one of the men,—he saw Mr. Rodolph.

Q. He saw Mr. Rodolph,—do you remember when that was?

A. I think in 1913 or 1914.

Q. He saw him once?

A. Yes.

Q. Only once?

A. I am not sure; I only remember once.

Q. Do you remember his seeing Mr. Ogden
602 at all?

A. I do not know I was ever in the house. (Turning to Mr. Nickel.) Who was the man who talked so much?

Mr. NICKEL. I do not think he was ever there.

Q. Mr. Wallis was there?

A. Yes, several times.

Q. Did your father receive mail, and examine it and read it himself?

603 A. Yes, the mail was always taken up to him from the office.

Q. All of it? Of course, you do not know. Did he keep a file there of letters?

A. No, only the children's. Because the mail was always sent back to the office, to file there.

Q. You say your father had made several wills before April 17, 1913; he made others prior to that time, that you know of?

A. Yes.

Q. You say that those wills were always exactly the same?

604 A. Always the same.

Q. You had seen the other wills?

A. I had seen one or two. I know his charities were exactly the same, and in fact I knew some of the other contents were exactly the same.

Q. How many wills prior to this one of April 17, 1913, do you recall your father having executed?

A. I haven't the slightest idea.

605 Q. Two or three?

A. Probably; probably two.

Q. You had seen them and knew of their execution?

A. No, I only know of one positively. The one about—I mean I only know by hearsay.

Q. There were no changes made,—everything was the same?

A. Yes.

606 Q. Will you please, Mrs. Nickel, tell me if you can, why was it that as long as your father had made, prior to April 17, 1913, a will which was then in existence and was the same as the will which he made on April 17, 1913, why did he want to make another will on that date?

A. That is something he never discussed with me, Mr. Benjamin.

Q. Did he give you any reason for having done it? And yet he made on that date a will just the same as previous wills?

607 A. He changed one charity. Practically it was the same will.

Q. Practically the same will. Did he ever execute a trust deed before he made this one?

A. I do not know.

Q. Did you ever hear of a trust deed having been made the previous times?

A. My father never discussed it with me.

Q. And when the matter of executing this trust deed became known to you, were you sur-
608 prised at the change in his plans?

A. No, because—I mean to say I had no interest in it, I mean to say.

Q. Why did you say that it made no difference to you?

A. Because it was father's property and he could do as he pleased. I never discussed anything with him excepting one charity.

Q. Did he at any time on April 17, 1913, or prior to that time, or subsequent to that time,
609 explain to you, give you any reason why he had made a trust deed at the same time he made this last will, which was entirely different, an entirely different purpose than he had ever had before?

A. No, sir. He always said that he had to pay an inheritance tax, he was always saying that he was sorry he had left so much money to charity.

Q. When was it he said that first?

A. That was the time I took the trust deed or will up to the house,—whichever you call it.

610 Q. That is, when you got it from the box?

A. Yes.

Q. And took it up to the house. Mrs. Nickel, had your father,—did your father prior to his death make any transfers of property to you of any kind?

A. Yes, the house and furniture at 2107 Laguna street.

Q. House and furniture?

A. Yes.

611 Q. When was that transfer made to you?

A. I do not know; I think in 1911.

Q. Is that the only transfer of stock, or property, he made to you prior to his death?

A. No, he transferred the property that was given my mother by Mrs. Lux.

Q. He transferred to you——

A. His share.

Q. Of the property that was——

A. Half to my brother's widow and half to

612 me.

Q. Was that in stock or in real estate?

A. I haven't the slightest idea; you must think I am a fool, but I am very sorry, but I really do not know.

Q. I assume that Mr. Nickel knows more about that,—the business end of it?

A. I do not know; I suppose it was stock.

Q. Was there some property, aside from the house on Laguna street and the furniture, there was an interest which your mother had in the Lux property?

613 A. Yes, sir.

Q. And whatever that interest was your father, after your mother's death came to him?

A. Yes, sir.

Q. And he transferred that to you and your brother?

A. My brother's widow.

Q. Whatever that interest was?

A. Yes.

Q. Were there any—when did he make that
614 transfer, by the way, do you remember, Mrs. Nickel?

A. I think it must have been in 1905; do you know, Mr. Treadwell?

Mr. TREADWELL. Between then and 1907.

A. I know my mother died in 1905.

Q. When was the house transferred, deeded to you,—I assume it was a deed, was it not?

A. Yes. 2101 Laguna street?

Q. Yes.

615 A. In 1911, that is as near as I remember.

Q. That is all right.

A. I think it was 1911, though.

Q. Were there any other properties transferred or given you by your father prior to his death other than this house that you mention and as regards your mother's share?

A. No.

Q. None whatever?

A. No.

Q. Cash or stock,—nothing of any kind?

616 A. Well, excepting as I drew as I pleased. I mean to say——

Q. You had an allowance?

A. No, I had no allowance; father told me whatever I wanted I was to have.

Q. Draw against his account?

A. Yes, sir.

Q. And you pursued that practice up to the time he died?

A. Yes, sir.

617 Q. Mrs. Nickel, the elevator was put in during your absence in Europe in 1912; was it prior to that your father had ceased coming down stairs to lunch?

A. Oh, no.

Q. He came down after the elevator was put in?

A. Yes.

Q. And along up to about what time in 1912 or 1913 was it?

618 A. I think he came down for luncheon as late as the fall of 1913. I think he was down for Thanksgiving, but I am not sure.

Q. But that is as late as you recall, is it?

A. Yes.

Q. Mrs. Nickel, I will ask you one question, and then we will adjourn. Your father's business affairs were not at any time handled by you, his business?

A. No.

619 Q. You were not in the habit of transacting any of his business for him in any way, shape or form, at any time?

A. No.

Q. Do you recall where it was that you signed the acceptance of this trust deed; where were you when you signed that trust deed?

A. Why, in the house.

Q. Was your husband there at the same time,—Mr. Nickel?

620 A. I do not think so, but I don't remember.

Q. You do not recall seeing him sign?

A. I don't remember one way or the other——

Q. You think——

A. And I don't know; I may,—must have signed it in the house.

Q. You have no distinct recollection?

A. No.

Q. Did you and Mr. Nickel go together before Mr. Mason for the purpose of signing the

621 acceptance to the trust deed?

A. I do not know that.

Q. You have no recollection of doing any such thing as that?

A. No.

Q. That is all then.

At this time the taking of the depositions in the above entitled matter adjourned to November 24, 1916, at 2 P. M.

622 Friday, November 24, 1916.

No. 304 Humboldt Bank Building,

San Francisco, California.

10:00 o'clock A. M.

The hearing before inheritance tax appraiser R. F. Morgan, in the matter of the estate of Henry Miller, deceased, No. 21,686, N. S., department No. 9, probate, continued from Thursday, November 23, 1916, was had at the above time and place.

623 Appearing for the State of California and John S. Chambers, state controller,

Raymond Benjamin, chief deputy attorney general,

William A. Sullivan, assistant inheritance tax attorney,

Hartley F. Peart, special counsel for state controller.

Appearing for the executors and trustees of
624 the estate of Henry Miller, deceased, and as personal representative of Mrs. Nellie Miller Nickel and J. Leroy Nickel,

Edward F. Treadwell.

Appearing for the department of internal revenue,

A. C. Scott, deputy internal revenue collector of the Northern District of California.

Thereupon the State of California and said state controller called as a witness:

625 J. LEROY NICKEL,

called as a witness, sworn, testified as follows:

Mr. BENJAMIN. Your name is J. Le Roy Nickel?

WITNESS. Yes.

Q. Your residence is San Francisco, Sacramento and Laguna?

A. Yes.

Q. The same residence mentioned in the testimony of your wife yesterday?

626 A. That is not my official residence; I vote at Menlo Park.

Q. Menlo Park? You have another home there?

A. Yes.

Q. But ordinarily speaking, your residence has been at 2101 Laguna?

A. Yes, since Mr. Miller's sickness.

Q. Since Mr. Miller's sickness?

A. Yes.

627 Q. Prior to that you resided practically all the time at Menlo Park?

A. Always.

Q. And when did you—when was it you moved to 2101 Laguna?

A. I commenced living there soon after the earthquake.

Q. Soon after the earthquake?

A. Yes.

Q. In 1906?

A. Yes; but only in the winter time.

628 Q. What was the occasion of your removal from Menlo Park to 2101 Laguna, San Francisco?

A. Well, Mr. Miller purchased that house after the earthquake, and Mrs. Nickel preferred being with him in the winter time,—that was the only reason.

Q. Mr. Miller was ill at that time?

A. No.

Q. I understood you to say that you went there to live shortly after Mr. Miller became ill.

629 A. No, I said after the earthquake.

Q. But, about Mr. Miller's illness?

A. Mr. Miller's illness started in 1910,—the earthquake was, of course, in 1906.

Q. Then you mean that there was no illness on the part of Mr. Miller prior to 1910?

A. No, I did not say that; but he had been active in business, except when interrupted by bad attacks of rheumatism.

Q. Yes. As a matter of fact, Mr. Nickel,
639 Mr. Miller was taken ill some little time after the earthquake,—the period of 1906?

A. No, I do not think so. It was only local,—confined to his feet,—rheumatism.

Q. He was suffering some illness, however, shortly after the earthquake?

A. Not to my knowledge,—no serious illness.

Q. Very shortly after the time of the earthquake, a very few months thereafter, Mr. Miller was in the care of nurses?

631 A. I do not think so. He may have been for a short time, but I do not recall it; there was no serious illness until October, 1910.

Q. October, 1910; then it became serious?

A. It became serious in the way that he was not able to make his trips.

Q. In October, 1910,—you speak of a particular period as indicating the time when the condition of Mr. Miller became serious, so far as health is concerned,—in other words, you
632 designate that as a period of demarcation from what had passed previously to what came subsequently?

A. Yes, simply because he was not able after that to make his trips.

Q. For what reasons?

A. Rheumatism.

Q. What was the result of the rheumatic condition; the physical conditions?

A. Well, he had acute suffering from swelling,
633 and rheumatism.

Q. Swelling; where?

A. In the feet.

Q. The legs?

A. Yes.

Q. Hips?

A. I could not go into that; I do not know that.

Q. Did it go into the hips and back?

A. I could not tell you that.

Q. When there were consultations with physicians were you present?

634 A. I was never in the room.

Q. Never?

A. I was never in the room.

Q. Did you discuss the matter with them subsequently,—after their consultation?

A. Not always; I think once or twice.

Q. What was the understand you derived

Q. What was the understanding you derived with respect to his condition?

A. They said that it was a very acute attack,
635 but not at all necessarily fatal to him.

Q. What was the character—were you present at any time that an examination of Mr. Miller was held by any of the physicians?

A. I answered that question "no".

Q. No. And did you learn from the physicians who did examine him as to the character of the examination of him they conducted?

A. I endeavored to answer that also,—they told me that he had a very bad attack of rheu-
636 matism.

Q. Did they make a more thorough examination than might have been covered by a visual diagnosis of the case; did they make, for instance, laboratory tests of urine and blood conditions?

A. I could not answer that; but I think it is probable; but I am not sure about that.

Q. Who were the physicians to whom this matter was committed?

A. Dr. Herzstein.

Q. And who else?

637 A. He called in, once or twice he called in Dr. Moffitt.

Q. Dr. Herbert Moffitt?

A. And Dr. Kerr.

Q. Dr. William Kerr is it?

A. I could not tell you.

Q. Kerr. Dr. K-e-r-r?

A. No, I do not think that is the way he spells his name.

Mr. TREADWELL. K-n-e-r-r.

638 Q. Let us identify the physician, if we can.

A. He pronounces his name that way (K-n-e-r-r).

Q. Do you know where his office is?

A. No, I do not.

Q. Mr. Nickel, you are at the present time connected in an official capacity with the corporation of Miller & Lux?

A. Yes.

Q. What official capacity do you occupy with
639 that corporation?

A. President.

Q. President; how long have you been president of the corporation?

A. Since the fall of 1914.

Q. The fall of 1914?

A. September.

Q. September, 1914. Prior to September of 1914 did you occupy any official position with the firm of Miller & Lux?

A. Yes.

640 Q. What position?

A. Vice-president.

Q. And for how long had you been a vice-president?

A. Since the formation of the corporation.

Q. And that was in what year?

A. 1897.

Q. 1897. Had you occupied any other or different official position with the firm since 1897,—other than vice-president or president,—

641 other than a member of the board of directors,—I am assuming you were a member of the board of directors?

A. I do not understand the question.

Q. You were a member of the board of directors?

A. I was also vice-president since the formation.

Q. Other than that of vice-president from its formation, you were a member of the board of

642 directors of the corporation, and from October, 1914, as its vice-president, did you occupy any other official position or have any other official title than those just named?

A. No, sir.

Q. As vice-president of the corporation since its formation and down to October, 1914, did you perform any active duties with respect to the business of the corporation?

A. Yes, sir.

Q. And where did you have your office?

643 A. Merchants Exchange Building.

Q. Merchants Exchange Building. During all of that particular period of time when you were acting as vice-president of the corporation did Mr. Miller—was Mr. Miller the president?

A. Mr. Miller was president.

Q. Yes; and did he devote himself to the business of the corporation?

A. Yes.

Q. Actively?

644 A. Yes.

Q. What were the duties, just generally speaking, Mr. Nickel, which were assigned to you to perform during that period of time as vice-president?

A. I had charge of the finances, of the litigation, and general conduct of matters of purely business nature, not connected with the ranches.

Q. You were not connected with the ranches?

A. No, I rarely went to the ranches before
645 Mr. Miller was confined to the house.

Q. You had general conduct of the finances pertaining to the litigation of the corporation?

A. The litigation, finances and the litigation, and general office management, matters of a business nature generally; banks, things of that kind, lumber——

Q. In the conduct of that particular department which was your department, did you frequently consult with Mr. Miller with respect to the matters that came under your supervision?

646 A. Yes.

Q. Where were these consultations usually held with him?

A. Sometimes in his room, sometimes in mine, adjoining.

Q. In the office?

A. We had separate rooms, adjoining, in the Merchants Exchange.

Q. Now, since 1906, Mr. Miller and you resided in the same house in San Francisco?

647 A. Yes; not entirely; I was in Menlo in the summer; in the winter I was at Laguna street.

Q. Have you maintained the home at Menlo ever since?

A. Yes, sir.

Q. And you maintain it yet?

A. Yes, sir.

Q. During the summer months you occupied the Menlo home about how long?

A. Say from April until October, November,—November, I think.

648 Q. During that period of time while occupying the home at Menlo were you in the habit of visiting Mr. Miller at the house on Laguna street, where he resided?

A. Very rarely; only if I came to the city to stay all night, to go to the theatre or something like that; not at other times.

Q. Were you in the habit of at times visiting the house on Laguna street and dining with him,—that is, while you were making Menlo the home?

649 A. If he happened to be in the city, yes.

Q. Upon those occasions were you in the habit of discussing business affairs with him,—of the corporation,—of a personal nature?

A. Probably so,—I could not say; most likely, because he generally talked business.

Q. As a matter of fact, Mr. Nickel, business was about the principal topic that interested Mr. Miller?

A. Yes, sir.

650 Q. Speaking of the particular matter that fixes October of 1910 in your mind, what incident was it that fixes that particular period in your mind, with respect to Mr. Miller's illness?

A. Simply because he often himself spoke about not having continued his regular trips after that; it was a well-known fact with all of us that was about the last of his continuous trips.

Q. Had there been any particular acute attack along about that time that brought about his dis-
651 continuance of trips?

A. Yes, there was at that time.

Q. Now, where did that acute attack occur, if you recall?

A. It occurred after he returned from a pretty hard trip, he had been gone two or three weeks.

Q. Two or three weeks?

A. Yes, a hard trip.

Q. Was he,—recalling the trip and the fact that he returned home from this trip at this

652 particular time, about October, 1910, you have that period fixed in mind?

A. Yes, sir.

Q. I want to direct a few questions to that particular time without constantly referring to it,—was he ill when he returned home from that trip?

A. I think not.

Q. How long after he returned home did he become ill?

653 A. I think about two weeks.

Q. About two weeks?

A. I would not be sure; that is my remembrance.

Q. Was he confined to the house? Before the attack became acute?

A. I think so.

Q. Were physicians called in at that time?

A. I think so.

Q. And from the time that he returned home

654 from this particular trip that you have mentioned, he was ill from the time he returned home and physicians were called in?

A. No, I did not say that; I did not say that he was ill from the time he returned home; I said after he returned home, but not immediately. I think he was not,—I do not believe the physicians were called until some time in November.

Q. But you said the condition became acute about two weeks after his return from his trip?

655 A. As I remember it.

Q. Before the attack or after it became acute?

A. I could not answer that.

Q. But practically about that time?

A. I think so; that is only general.

Q. And was he confined to his bed at the time the physicians were called in?

A. I do not think so.

Q. You do not think so?

A. No, he was rarely in bed.

656 Q. The active management of the properties by Mr. Miller consisted in what,—what duties were those he personally and individually performed in connection with the corporation itself?

A. The management of the livestock and the farming.

Q. Now, that includes the livestock wherever situated, and the farms wherever situated,—California, Nevada or Oregon?

A. Yes, sir.

657 Q. Are there lands in any other states than those three I have just mentioned?

A. Yes, some in Utah.

Q. Any in Idaho or Wyoming?

A. It lies in Idaho and Utah.

Q. That is, along the southern bundary of Idaho?

A. The three corners of Idaho, Utah and Nevada. Those ranches were purchased by me since,—I think it was in 1913.

658 Q. The properties,—they are properties that have been acquired, then, in 1913?

A. Yes.

Q. The title lies in Miller & Lux?

A. Yes.

Q. Those are the only states in which properties of Miller & Lux exist?

A. That is all.

Q. The personal properties belonging to the corporation of Miller & Lux, such as stocks and
659 bonds,—stocks in other corporations,—where are those personal properties located?

A. Right here in San Francisco.

Q. San Francisco; they have been here at all times?

A. Yes, sir.

Q. The firm of Miller & Lux, the old corporation, which is the California corporation, was dissolved by operation of law somewhere along about 1907 or 1908?

660 A. 1908, I think around there.

Mr. Treadwell. Technically it is there. The land in those other states are in Miller & Lux.

Q. The title to those lands lies in what subsidiary company, Mr. Nickel?

A. The title of the company is Pacific Livestock Company, all the stock of which is held by Miller & Lux.

Q. In discussing these various properties we will refer to them as the properties of Miller &

661 Lux, even though the legal title may rest in one or more subsidiary corporations.

A. That is what I had in mind when I answered the question that way.

Q. Just as the same as the Kings River Canal and Irrigation Company stock is stock belonging to Miller & Lux?

A. Yes.

Mr. TREADWELL. In a measure.

Q. The controlling factor.

662 A. It is not all owned by Miller & Lux, but the control is.

Q. Although the title of the properties rests in the legal corporation of the San Joaquin Kings River Canal & Irrigation Company?

A. What Mr. Treadwell had in mind was that there are other stockholders than Miller & Lux in that corporation, but none other in the Pacific Livestock Company.

Q. By the way, it will be necessary for us,
663 of course, to have the names of all of the subsidiary corporations,—are you prepared to give us those names at the present moment?

A. Yes.

Mr. TREADWELL. They are all much better obtained through the secretary.

Q. Mr. Merritt?

Mr. TREADWELL. Shares of stock,—matters of that kind, there will be no question about. It would be very difficult for Mr. Nickel to remember such matters.

664 Q. You were—Mr. Nickel, you are the husband of Mrs. Nellie Miller Nickel who testified yesterday?

A. Yes, sir.

Q. And I did not ask to the date of the marriage yesterday,—when were you married?

A. August 11, 1885.

Q. You are not a blood relative in any way of Henry Miller?

A. No, sir.

665 Q. Mrs. Nickel testified yesterday as to the various members of the family. Mr. Nickel, let me have this once more, although it may seem unnecessary. Mr. Miller had one son, one daughter——

A. Two daughters.

Q. Two daughters,—will you give us the names?

A. Sarah Alice died at about the age of fourteen.

666 Q. Without issue,—she was not married?

A. No, not married.

Q. And the son was?

A. Henry Miller, Jr.

Q. And when did he die?

A. That I could not say,—about five years ago.

Q. Without issue,—no children?

A. No children.

Mr. Treadwell. It must have been longer than that.

667 A. Time passes,—I could not say.

Q. What is your wife's age?

A. Fifty-one years.

Q. Now, you have had three children by this marriage?

A. Yes.

Q. As I understand it——

A. We have three at present, one died.

Q. Three living?

A. Three living.

668 Q. Four children of the marriage,—one of your children died?

A. Yes.

Q. And the name of that child was?

A. Henry Miller Nickel.

Q. When did your boy die?

A. Ten years ago.

Q. Then the other children——

A. 1898. I would not be sure,—it may be eight, no about ten years ago.

669 Q. Then the names of the other children and their ages?

A. George Wilmath.

Q. And what is his age?

A. He is twenty-nine.

Q. Twenty-nine. The daughters names and ages?

A. Beatrice Sarah.

Q. Beatrice Sarah—and what is her age?

A. She is twenty-three.

Q. Twenty-three at the present time?

670 A. Yes.

Q. And the youngest?

A. J. LeRoy Nickel, Jr.

Q. Then there were two boys and two girls?

A. Three boys.

Q. And how old is he?

A. Twenty-one.

Q. Twenty-one. And you say Mrs. Miller is fifty-one?

A. She was born the 13th of August, 1865.

671 Q. Now, can you give me the birthday of George Wilmath Nickel?

A. Some time in February, 1887.

Q. And Beatrice Sarah Nickel,—her birthday?

A. I could not give that,—I think she will be 24 in December.

Q. That would be in 1894,—she was born in December, 1894?

A. I am not most positive about the month, I know she is not twenty-four yet.

672 Q. December, 1892?

A. Yes, that would make it.

Q. She will be twenty-four the coming December?

A. Yes.

Q. J. LeRoy Nickel, his birthday,—the younger—is what?

A. He was twenty-one last May.

Q. That would be 1895. He was born in May, 1895. What is the occupation of your son George Wilmath Nickel?

673 A. He is superintendent of the division.

Q. Of Miller & Lux?

A. Yes.

Q. That is located where?

A. That is located in Merced county.

Q. And consists of certain divisions of the properties?

A. Yes.

Q. In farming and cattle land?

A. Yes.

674 Q. How long has he been occupying that position?

A. About a year and a half.

Q. Prior to that time what was his occupation?

A. He has been,—he has occupied several positions on the ranches,—had charge of one of the cattle divisions at one time.

Q. In California or Nevada?

A. Down there.

675 Q. How long has he been in the employ of Miller & Lux? I assume that he is in charge?

A. Yes, on a salary. He graduated from college, I cannot think of the year,—ever since I should say,—let me see, he graduated when he was twenty-one, about eight years.

Q. He is a graduate of the University of California?

A. Yale.

Q. Yale. And since his graduation at Yale he has been in the employ of Miller & Lux, and on the ranches?

676 A. Yes.

Q. Your daughter Beatrice resides at home?

A. Yes.

Q. She has no occupation other than—J. LeRoy is twenty-one years,—has he any occupation at the present time?

A. Student at Yale.

Q. And has been for how long?

A. This is his third year.

Q. He will have one more year there?

677 A. Yes.

Q. Your son George is married?

A. Yes, sir.

Q. And he married whom?

A. He married a Miss McNear.

Q. What was her first name please?

A. Ernestine, I think is her sole name,—she may have a second name; I only know her as Ernestine McNear.

Q. They have two children, have they not?

678 A. One.

Q. And the name of the child?

A. She has two names.

Mr. Treadwell. Sarah Miller.

A. No, I do not think so; Sarah is one name, but I think she has another, but I could not tell you what; they call her Sally, she is known as Sally, Mr. Treadwell, but that is not my testimony, I do not know.

Q. Well, is it stipulated that her name is Sarah Nickel? Sarah Nickel, as I understood

679 from Mrs. Nickel, Sarah Nickel is eleven months old. Your son, Henry Miller Nickel, now deceased, was unmarried at the time of his death?

A. Yes, sir.

Q. He never had been married?

A. No, sir.

Q. He had no children?

A. No, sir.

Q. Was the son of Henry Miller, deceased,—not speaking of your son, but of Henry Miller,
680 Senior,—did he leave any children?

A. No, sir.

Q. Sarah Alice Miller is dead?

A. Yes, sir.

Q. Was she married prior to her death?

A. No, sir.

Q. There are no children by Sarah Alice Miller?

A. No, sir.

Q. Mr. Nickel, I call your attention to a pro-
681 vision on page 4, lines 42 et seq., of a trust deed, reading as follows: "and provided further that the provision herein made for the sons of the said Nellie Miller Nickel and J. Leroy Nickel is made on the express condition that before the same, or any part thereof, is paid to them they shall be sober and industrious, and shall have entered upon some useful and honorable business or calling, and if at any time, either before or after said income is first paid to said sons, any of them prove lacking in these qualities, said

682 trustees shall withhold said share from such son until such time as he has satisfied this condition,"—your son George Wilmath Nickel's occupation is, as you have testified,—and what about his sobriety?

A. He is entirely sober.

Q. Entirely sober?

A. Yes.

Q. A man who indulges at all in stimulants or intoxicating liquors?

683 A. Never to excess.

Q. Not to excess?

A. I do not think he ever visits saloons, but I think he takes a glass of wine with his meals.

Q. And J. LeRoy Nickel, Jr.?

A. The same would apply to him.

Q. He has not as yet entered into any occupation? He is still a student?

A. Yes, sir.

Q. But the same statement would apply to

684 him as far as the indulgence in liquor is concerned?

A. To the best of my knowledge, yes.

Q. What was the occasion for the calling in of the physicians and the consultation of physicians about October, 1912?

A. I could not tell you that. Dr. Herzstein from time to time told me that he felt that it was a satisfaction to himself to know, to have somebody else express an opinion, because he felt it a great responsibility on himself, and he

685 preferred to have some person see if any other treatment could be recommended.

Q. Dr. Herzstein had been Mr. Miller's physician for some little time prior thereto?

A. Yes.

Q. How long had Dr. Herzstein been treating Mr. Miller prior to October, 1910?

A. I could not tell you,—only in a general way,—I should say five or ten years.

Q. Five or ten years?

686 A. Yes.

Q. What for?

A. I could answer that better than that now. I first had Dr. Herzstein. I was ill in 1893, and after that when Mr. Miller had occasion for a physician he called him in.

Mr. Treadwell. 1893 or 1903?

A. 1893.

Q. Dr. Herzstein was your physician particularly?

687 A. Yes, sir.

Q. And then from that time forward whenever Mr. Miller was ill Dr. Herzstein was called?

A. Yes, sir.

Q. Prior to this time in October, 1910, that you have mentioned, how frequently had Dr. Herzstein been in the habit of calling on Mr. Miller,—how often had he visited him?

A. I could not answer that,—I think rarely.

Q. Had his visits been of a regular family physician for any particular length of time?

688 A. Regular? I do not understand.

Q. Had his visits been of a character such as those of a regular family physician?

A. No.

Q. This occurrence, whatever it was, of about October, 1910, was practically the date of constant attendance upon Mr. Miller by the physicians?

A. Yes, sir.

Q. And from that time forward how fre-
689 quently did Dr. Herzstein visit Mr. Miller?

A. Practically every day.

Q. Sometimes more frequently than once a day?

A. Yes, I think occasionally.

Q. How many times did he call, as far as you know, Mr. Nickel, other physicians in consultation with him about that time or subsequent thereto?

A. I could not answer that, except in a gen-
690 eral way.

Q. You know by general knowledge there were several consultations?

A. Yes.

Q. Did they ascertain at that time that Mr. Miller's heart was affected?

A. Mr. Miller had a heart that was affected all his life,—ever since I first knew him.

Q. What was the nature of the trouble?

A. I could not tell you that. I do not know.

Q. How did it manifest itself?

691 A. I do not—never knew it to manifest itself in any way.

Q. Palpitations of the heart?

A. I do not think so; finally it was not the cause of his death, it did not produce the end.

Q. But what was the condition?

A. It was always known that he had a weak heart.

Q. Weak heart?

A. Yes.

692 Q. Was it ascertained what was the reason for the weakness?

A. Not that I know of.

Q. You never learned that?

A. No, sir.

Q. Had you ever heard any of the physicians state, or did they ever state to you that Mr. Miller was suffering from what is known as angina pectoris?

A. No, sir.

693 Q. Did you ever learn that to be the fact?

A. No, sir.

Q. Did he—this rheumatic condition that you mention in 1910 affected him to such an extent that he was unable to leave the house for a considerable period of time?

A. Yes, sir; I could not tell you how, how long.

Q. Approximately how long?

A. I could not give you an approximate answer.

694 Q. It would cover a period of some months?

A. I could not tell you that. I know he was accustomed to motor every day,—just what time he commenced motoring I could not tell you.

Q. You do not know what physical local conditions occurred by reason of his condition at that time. You say that it affected him in his feet and legs,—did you ever see his condition yourself in that regard?

A. No, sir; it had the effect he could not
695 walk with much facility, but he did walk around the house.

Q. It affected the joints particularly?

A. I think it did; I think it affected him in various ways.

Q. Did he complain of pain?

A. At times he had very acute pains. It was of an imflammatory nature.

Q. Was he able to wear his clothing and shoes at all times?

A. Every day.

696 Q. He was not so affected that he was not able to put on his shoes?

A. Yes; he wore large shoes.

Q. A specially constructed shoe,—soft shoes?

A. A large size.

Q. Was he treated with medicines solely, or by massage, or how; what character of treatment was given Mr. Miller at that time?

A. I think massage was tried for a while. I could not say to what extent.

697 Q. Do you remember anything about the character of treatment other than massage that was administered?

A. Other than massage; I think not.

Q. Were his legs swollen?

A. At times.

Q. At times. How long did that condition prevail?

A. I could not tell you.

Q. It lasted a considerable period of time?

698 A. I could not tell you.

Q. As a matter of fact the condition that developed along about October, 1910, never ceased to be the condition that he suffered down to the time of his death?

A. Well, he improved very much after that.

Q. He improved and then got worse?

A. Yes, he would have bad attacks, it would return.

Q. He never was entirely well from that

699 time forward to the time of his death?

A. No, sir.

Q. And when did he begin to get somewhat worse than the condition that was first started in October, 1910?

A. I saw him practically every day when I was in town. He was, up to the last year, he was practically the same,—mentally about as strong as he ever was; at times he walked; he did not walk as well the last year as he had before, but his mental vigor was acute I should say up to six months before he died.

700 Q. When was he unable to walk up and down stairs at the house, so that the elevator was put in the house?

A. I could not answer that very accurately; I do not know. I could not answer that.

Q. Mrs. Nickel yesterday testified that it was somewhere prior to October, 1912,—does that agree with your general recollection?

A. I could not tell you.

Q. Where was it located, with respect to Mr.
701 Miller's rooms?

A. Some distance from Mr. Miller's sitting room.

Q. Was his sitting room in the front of the house?

A. In the rear. And this is almost the opposite end of the house.

Q. The elevator is just a one-story elevator?

A. Yes, sir.

Q. Running from the floor upon which he
702 stayed most of the time to the main floor of the house only?

A. Yes, sir.

Q. And it was installed for his purposes and uses particularly?

A. Yes, sir.

Q. Did I understand you to say that your position with the corporation of Miller & Lux, as vice-president, continued down to October, 1914, and then you became president?

A. Yes, sir; September, not October.

703 Q. What brought about—what was it that had occurred at that time, if anything, which resulted in that particular change of your official title?

A. Nothing occurred.

Q. Mr. Miller himself retired at that time as president?

A. Yes, sir.

Q. Was that—were you elevated to the position of president at the annual meeting of the stockholders, or——

704 A. I am not sure about that.—whether there was an election or not; there was really no occasion for it, for as vice-president I had full powers as president; there was really no occasion for the change.

Q. Are you able to recall, or can you recall the date fixed for the annual meeting of the stockholders of Miller & Lux.—what month of the year it occurs in?

A. I think it is April.

705 Q. Then your elevation to the office of president occurred by reason of action of the board of directors taken in September, after the annual meeting of stockholders?

A. I think so.

Q. Who was elected vice-president in your place?

A. Frank B. Anderson.

Q. Frank B. Anderson; did Mr. Miller tender his resignation as president at that time to the board of directors?

706 A. I presume so; but it may have been a meeting of the stockholders; I could not say.

Q. Well, the president was not elected by the stockholders, but by the board of directors?

A. I say we may have elected a new board of directors; anyhow there had to be some director to take Mr. Miller's place.

Q. Did Mr. Miller himself resign as a member of the board of directors?

A. I am not sure about that; I haven't looked
707 it up; it wasn't a matter of much importance at the time.

Q. Did he resign in April, 1914, when the annual meeting of the stockholders occurred?

A. I could not answer that. I know he remained a director for a long time after he was ill.

Q. Do you recall how long?

A. I think he remained a director, but I would not be sure, after I became president.

Q. He remained a director after you became
708 president?

A. I think so, but I could not be sure; the records will speak for that.

Q. Did he ever resign as a director of the corporation?

A. That is why I am in doubt; I don't remember anything on the subject. It was done after a meeting of the stockholders, when a new board was elected.

Q. Did Mr. Miller control the stock of the corporation?

A. Yes, but I held his power of attorney.

709 Q. Do you recall the meeting at which you were made president of the corporation?

A. No, sir, I do not.

Q. Was that meeting in pursuance of the request of Mr. Miller?

A. No, sir; I don't think so

Q. Between whom was it agreed that you should become the president of the corporation?

A. Nobody; myself.

Q. Had you talked over the matter with Mr.
710 Miller himself?

A. I do not recall of having done so.

Q. After you were elected president, you informed him of that fact, that you were the president?

A. I think so.

Q. Did you not inform him of your intention to elect yourself president of the corporation prior to that time at all?

A. I do not think so; but I would not be sure.
711 It was not a matter of importance, for the reason that I was exercising full powers, and had his power of attorney; it was a formal matter, of no importance.

Q. You had his power of attorney to vote his stock?

A. I had full power of attorney to do everything.

Q. Full power of attorney to do everything?

A. Yes, sir; as I remember it.

Q. Would you furnish us with a copy of that power of attorney?

712 Mr. Treadwell. It is a general power of attorney.

Q. How long had you held that power of attorney, Mr. Nickel?

A. I could not tell you; I could not tell you that.

Q. It was the one you held at that time, had held for some time; it had not been reissued or re-made?

A. I think not.

713 ———

(Direct examination temporarily suspended) and

E. Frank Campbell, called.

Mr. Sullivan. Q. Mr. Campbell, what is your occupation, please?

A. Professional nurse.

Q. And how long have you been such?

A. Twelve or fifteen years,—fifteen years,

714 yes.

Q. You are the same Frank Campbell who subscribed to the will of Henry Miller?

A. I am.

Q. Where do you reside?

A. 1011 Fell street.

Q. In this city?

A. The city.

Q. And are you engaged in your occupation at the present time, as a professional trained nurse?

715 A. I am.

Q. At what particular location?

A. No. 525 Twenty-fifth street, Oakland.

Q. You have a particular patient there, have you?

A. I have.

Q. The name, please?

A. Courtney.

Q. How long do you expect to be in attendance upon that patient?

716 A. Not very long,—a day or two more.

Mr. Sullivan. If there is no objection, Mr. Campbell will be excused until 10 o'clock Saturday morning.

Mr. Treadwell. No objection.

Direct examination of

J. LeRoy Nickel, resumed.

717 Mr. Benjamin. Q. What is your age, Mr. Nickel?

A. Sixty-five; I was born the 25th of January, 1851.

Q. Will you give us the name again of the gentleman who was elected vice-president when you became president?

A. Frank B. Anderson.

Q. Of the Bank of California?

A. Of the Bank of California.

718 Q. Do you know whether or not the election of Mr. Anderson was discussed by you with Mr. Miller?

A. I think so, but I would not be sure; I think so.

Q. About how long before he was elected vice-president did you discuss the matter of Mr. Anderson being selected as vice-president?

A. I am not sure that I discussed it; I think it is probable I told him afterwards; that is my
719 remembrance.

Q. Were there any other changes made in the membership of the board of directors at that time?

A. I am not certain.

Q. Of the corporation?

A. I am not certain; my son was a director for a while.

Q. Which one,—George?

A. Yes; and as he is not living in town now,
720 it is not convenient, and I think a change was probably made for that reason, but I do not know what time.

Q. There are five members of the board of directors, are there?

A. Yes, sir.

Q. In 1914, according to your best recollection, the annual election was held in April,—who were elected directors besides yourself,—and was Mr. Anderson elected a director at that time?

721 A. No, Mr. Anderson had been a director before that; he had been a director for some time.

Q. He had been a director prior to that time?

A. Yes. The others were David Brown, C. Z. Merritt and William S. Mitchell; Mr. Anderson and myself,—we are the present directors.

Q. The position of office manager is held by Mr. Merritt?

A. Yes, sir.

722 Q. And he has constantly held that position for a long period of years?

A. Yes, sir.

Q. Mr. Brown, David Brown, is the secretary of the corporation?

A. He is the secretary of the corporation.

Q. And for how many years has he held that position?

A. Since its formation,—1907.

723 Q. You are not prepared to say at the present moment, from your independent recollection, just when Mr. Miller himself ceased to be a member of the board of directors?

A. No, sir; I could not tell you that.

Q. He did, however, cease to be its president at the time you became the president?

A. Yes, sir.

Q. How frequently did Mr. Miller visit the offices of the corporation after his illness commenced in October, 1910?

724 A. Very rarely. Mrs. Nickel said yesterday two or three times; I should say that would fully cover it.

Q. Two or three times?

A. Perhaps not more than twice.

Q. Down to the time of his death?

A. Yes, sir.

Q. He was in the habit of having a stenographer from the office come up to the house?

A. Practically every day.

725 Q. Which one,—did he have any particular stenographer that came to take his dictation?

A. Miss Thomas—a stenographer in our office.

Q. She is with you yet?

A. Yes.

Q. How frequently would she visit the house for the purpose of taking dictation from Mr. Miller?

A. Practically every day.

726 Q. Up to the time of his death?

A. No, sir; she did not; the last two years he did not give any dictation.

Q. He gave no dictation for two years,—that would be during the year 1915, 1916, that you mean?

A. No, I think it was in the early summer of 1914.

Q. That he ceased giving any dictations at home?

A. Yes, sir.

727 Q. What was the occasion of his ceasing to dictate to her, or her visiting the house for the purpose of taking dictation?

A. The doctor wanted him to discontinue it; said it got him interested in business matters and he did not sleep well, and he always objected to it, but Mr. Miller would not give it up.

A. Up to that time he continued to interest himself in business and gave directions and dictated letters to Miss Thomas,—I presume she
728 transcribed them down in the office?

A. Yes, she typed them in the office.

Q. And they were sent out to the various properties?

A. Yes, sir.

Q. Were there copies always preserved of his letters?

A. Yes, sir.

Q. And those letters, some of them, came under your eye, I assume, before they went out?
729 A. Yes, some of them.

Q. What was the nature of them?

A. Referring to a great many details,—farming and management of cattle.

Q. To whom would they be directed?

A. All the superintendents.

Q. All the superintendents. And they would, —and did they deal with questions of purchases of property and purchases of cattle in behalf of the cattle, or sales of property and cattle, and matters of that character?

730 A. Not to much extent to sales or purchase of property, but management, movement of live stock, farming operations,—that nature; the same nature and character of supervision he had exercised on the ranches.

Q. At all times?

A. Yes, sir.

Q. The organization of Miller & Lux, as a corporation, had various directing heads in the nature of superintendents of departments, did

731 it not?

A. Yes, sir.

Q. The property here in San Francisco, the abattoir, is that under one man?

A. Yes, sir.

Q. Who is that?

A. Reddy, Charles Reddy.

Q. How long has he been superintendent there?

A. About five years.

732 Q. How are the other properties divided in departments,—are the San Joaquin lands under separate management?

A. Yes, sir; certain territories set off under the supervision of certain superintendents.

Q. Who were the superintendents down through that country?

A. Who were?

Q. Who are or were during Mr. Miller's life-time,—say for the last ten years?

A. D. W. Wallis.

733 Q. What was his department?

A. Superintendent Los Banos Division.

Q. How far south did that extend?

A. That lay, lies adjacent to the Santa Rita division.

Q. Who was the superintendent of that division?

A. Mr. Safastron.

Q. What are his initials?

A. H. F.

734 Q. Now, give us the other divisions and superintendents of the respective divisions, if you will, please.

A. You mean at the present time?

Q. No, during the last ten years we will say of Mr. Miller's life.

A. They varied; changes were made. Henry Bader, superintendent of Riverside division; A. F. Ogle, Poso division; he was also the superintendent of the East Side division, and James
735 Ogden was superintendent of southern division in Kern county, and John Gilcrest of the Oregon and Nevada divisions.

Q. Now, do those constitute the divisions of the properties in California?

A. Yes, sir.

Q. What about Nevada?

A. Well, I covered that—John Gilcrest. It was always one division there,—it is now in two.

Q. Were his duties of superintendent over all of the properties in both of these states?

736 A. Yes, sir.

Q. And he was back and forth?

A. Yes, sir.

Q. When you made the purchase of these lands on the border of Idaho, Utah and Nevada for the benefit of the Pacific Live Stock Company did those properties come under his supervision also?

A. No, sir.

Q. The Pacific Live Stock Company proper-

737 ties were under a different superintendent?

A. Well, Mr. Gilcrest was the superintendent of these properties, but a man named John F. is today superintendent of the property in Utah and Idaho, but at the time of Mr. Miller's management it did not exist,—we did not have the property.

Q. Can you give us approximately the number of employees of Miller & Lux, Mr. Nickel?

A. No, I could not; I could not tell you; I

738 would not want to guess.

Q. Does it amount to a thousand?

A. I should say so,—more than that.

Q. Five thousand?

A. No, sir; I could not tell you.

Q. And in the abattoir here in San Francisco, approximately how many are there?

A. Seventy-five.

Q. The large number of employees are out upon the farm lands?

A. Oh, yes.

739 Q. And the ranges?

A. Yes, sir.

Q. Are they fairly well divided between the properties,—the number of employees?

A. They are now. Under Mr. Miller's management divisions were much larger; I have made more divisions.

Q. You have made more divisions than he had?

A. Yes, sir.

740 Q. When did you make that change?

A. Oh, gradually, within the last five years,—six years—made them gradually.

Q. With respect to the property of the Pacific Livestock Association——

Mr. TREADWELL. Pacific Livestock Company.

Q. Pacific Livestock Company; that is a Nevada corporation, is it not?

A. California corporation.

Q. California corporation. And it is practi-

741 cally an operating company?

A. Yes, sir.

Q. Holding some lands, but largely deal in cattle, with the cattle, is that not the fact?

A. It has 100,000 acres of land.

Q. By the way, can you give us approximately the number of acres of land owned by Miller & Lux itself?

A. No, sir; I haven't figured it up.

Q. Well, approximately, can you make some estimate?

742 A. Between 500,000 and 1,000,000.

Q. In California,—do you know what the holding is in California?

A. Say something like 600,000.

Q. 600,000 in California; and the holdings are not as large in Oregon and Nevada?

A. No, sir; probably 150,000 in Oregon and Nevada,—100,000 in Oregon.

Q. When did Mr. Miller first discuss with you the execution of this trust deed that was exe-

743 cuted in April,—April 17, 1913?

A. He did not discuss it with me; he discussed it with Mr. Treadwell prior to its execution.

Q. He did not discuss it with you?

A. No, sir; not at all.

Q. You knew that he was going to execute the deed?

A. Yes, sir; from Mr. Treadwell.

Q. How long prior to its execution did you

744 know of it?

A. Probably a month.

Q. And did you know at the same time he intended to make a will?

A. Yes, sir.

Q. At the same time?

A. Yes, sir.

Q. Did you learn of that fact from Mr. Miller?

A. Mr. Treadwell.

Q. Only from Mr. Treadwell?

745 A. I did not discuss it either with Mr. Miller.

Q. You did not discuss it?

A. No. I considered it rather indelicate and did not take it up with him.

Q. Were you present at the time he executed either the will or the deed?

A. No, sir.

Q. Were you in the house,—living in the house at the time?

A. I could not tell you; I may have been on
746 the ranches. I was away half the time.

Q. Were you making the Laguna street house your home at that time?

A. Yes, sir; but I was on the ranches probably half the time.

Q. Did you know of the fact that he had executed a will previous to this one?

A. Yes, sir.

Q. And had you discussed with him the terms of the will that he previously executed?

747 A. Yes, sir.

Q. You had discussed that with Mr. Miller?

A. Yes, sir.

Q. How many wills had Mr. Miller made prior to the one he had made on April 17, 1913, to your knowledge?

A. He changed it two or three times, but I only discussed the one that I remember, but its main features were the same.

Q. The main features of the previous will?

A. Yes, 1908.

748 Q. When he made a will?

A. Yes; it contained the same features.

Q. Prior to that will in 1908 do you recall when it was he executed another will?

A. Well, I happened to know the will he made in 1887, casually, but that one he did not discuss that with me.

Q. 1887?

A. Yes.

Q. You know of a will, you say, that was
749 made about 1887, and knew of the contents of it?

A. No, sir; I did not know the contents of it.

Q. The will, however, that was executed in 1907,—did I understand that date?

A. About 1908.

Q. 1908,—you did know about the execution of that will?

A. Yes, sir.

Q. Were you present when it was executed?

A. No, sir.

750 Q. You did discuss the contents of it with Mr. Miller, however?

A. He discussed it with me.

Q. The same thing?

A. He took it up with me, and I did not take it up with him.

Q. Did he show you the will?

A. He asked me, he told me what he,—he invited Mr. Treadwell to his country place, Mount Madonna, and when he came back he told me that he had told Mr. Treadwell what he wanted

751 to put into this will, and asked me to take it up with Mr. Treadwell.

Q. That was in 1908?

A. Yes, sir.

Q. Were you present when he executed that will?

A. No, sir.

Q. You went over the terms of the matter with Mr. Treadwell and the document was prepared for his signature?

752 A. Yes, sir.

Q. After such discussion that had been held between yourselves?

A. No, I was not at Mount Madonna; he was with Mr. Treadwell alone.

Q. Where did he take the matter up with you?

A. In the office, when he came back.

Q. Upon his return?

A. Yes, sir.

753 Q. With respect to the will which he executed in 1913,—he did not take that matter up with you?

A. I do not think so. The will?

Q. Yes.

A. I do not think so. It was the same,—he took it up with Mr. Treadwell.

Q. Where did you learn that it was the same?

A. From Mr. Treadwell. I would not say that I did not know; I would not be sure, but I do not recall. Quite likely he referred to changes,

754 principally, in regard to legacies; I tried to avoid any discussion with him about the legacies he proposed to make.

Q. Do you remember having any conversation with Mr. Miller at all with respect to that will, either before or after its execution in 1913?

A. No, sir, I do not.

Q. When did you first learn that in addition to a will that was made at that time, 1913, that a trust deed had been made?

755 A. About, I think, a month before it was executed.

Q. Before it was executed?

A. Yes; from Mr. Trendwell.

Q. Mr. Trendwell, it was then, who informed you that Mr. Miller intended to make a trust deed?

A. Yes, sir.

Q. Did he tell you the provisions that were to go into the trust deed?

756 A. I think so.

Q. Did you say anything to Mr. Miller, or he to you, about that particular matter?

A. Not at that time; he may have mentioned it to me afterwards, but I do not recall.

Q. What, if anything, did he say?

A. I say I do not recall anything, because the contents of the trust deed are substantially the same, so far as the will is concerned, as the previous one.

757 Q. Did you learn, there were some conversations, were there not, after its execution, between yourself and Mr. Miller with respect to the properties?

A. Oh, I presume so, but I do not recall any now.

Q. Did he ask you to act as a trustee of this property, did Mr. Miller ask you to act?

A. No, I do not recall that he did.

758 Q. Did Mr. Miller deliver any properties to you at that time?

A. The will was executed,—the trust deed was executed and Mr. Treadwell delivered it to me.

Q. The deed and the will?

A. He delivered the trust deed to me.

Q. There was no personal action with respect to this matter between yourself and Mr. Miller at all, I understand?

759 A. No, none whatever.

Q. Did he send any message to you through Mr. Treadwell, or otherwise, asking whether or not you would be willing to act as trustee?

A. I do not recall any.

Q. When did you first see the trust deed itself?

A. I read it over I think before it was executed.

Q. Before it was executed?

760 A. I think so. Mr. Treadwell handed it to me,—I am not sure,—but Mrs. Nickel read it to me also.

Q. Before it was executed?

A. Yes, sir.

Q. Did you know when he was going to sign it,—the day?

A. No, I do not think so. Just as likely I was away when it was signed.

Q. Have you any independent recollection of
761 the day itself,—when it was signed?

A. No, sir.

Q. Have you any independent recollection when you yourself signed it?

A. No.

Q. You have no recollection as to when you accepted the trust?

A. No, sir.

Q. Do you know whether or not you and your
762 wife were together at the time you signed it?

A. I do not think so; it is not the usual custom. She generally signs documents of that kind before a notary at the house, and then the notary comes to me,—I think that was the practice in this case. Mr. Mason came to take the acknowledgment in my office.

Q. In discussing the matter with Mr. Treadwell, I understand you first remember that there was to be a trust deed?

A. Yes, sir.

763 Q. Were you advised by Mr. Treadwell at that time that the contents of the trust deed and the will were to be the same?

A. Yes, sir.

Q. And what did you do with the trust deed and with the will after they were handed to you by Mr. Treadwell?

A. He did not deliver the will to me,—it was the trust deed.

Q. What did you do with the trust deed after
764 it was delivered to you by Mr. Treadwell?

A. I sent Mr. Brown out to the Trust Company and rented a box,—had him make a contract to rent it—and then I took the deed over there and deposited it,—got two keys,—I gave one to Mrs. Nickel and kept one.

Q. Did you ever remove the deed from the box subsequent to that time?

A. Not until after the death of Mr. Miller.

Q. Was there anything placed in the box be-
765 sides the trust deed?

A. Certificate of stock,—Mr. Miller had endorsed the certificate of stock.

Q. When?

A. At the time of the execution of the will,—he delivered it with the trust deed.

Q. How many shares of stock?

A. Practically all of it.

Q. When had he endorsed this stock,—do you know?

A. Yes; at the time he executed the will

Q. And were you present?

766 A. I presume so; that was the first time it had been delivered and had not been endorsed by him before.

Q. Were any other shares of any other stock delivered to you at that time besides the stock of Miller & Lux, Incorporated?

A. No, sir.

Q. And was this all in one certificate?

A. One certificate.

Q. Endorsed in blank?

767 A. I would not be sure about that.

Q. Did you examine the certificate,—what character of endorsement was there upon it?

A. I do not recall that.

Q. Had it been turned into the secretary of the corporation and re-issued, or was the original stock certificate endorsed by him?

A. I could not answer that.

Q. You do not recall that?

768 A. No, sir.

Q. At the time of the execution of this will and deed, you learned from Mr. Treadwell that the contents were to be identically the same,—practically the same, as the previous will?

A. I think so, with the change of some legacies.

Q. Did Mr. Treadwell tell you any reason why the trust deed was to be executed?

A. Only——

769 Mr. Treadwell. Just a moment. I want to advise you that you need not answer that question, Mr. Nickel.

Q. At the time that Mr. Treadwell informed you that Mr. Miller intended to make a new will and trust deed, you learned that at one and the same time, that there was to be a new will and trust deed?

A. I think so.

Q. And you learned that from Mr. Treadwell
770 prior to the execution of the will and trust deed?

A. I think so.

Q. And prior to the execution of the will, or of the deed, your best recollection is that you saw both the proposed new will and the proposed deed?

A. Yes, sir.

Q. Whatever information you obtained with respect to those documents, as to the reason for
771 their execution, you obtained from Mr. Treadwell?

A. Mr. Treadwell; yes, sir.

Q. What did he tell you about the matter at that time?

Mr. Treadwell. I do not want to be put in position of objecting; Mr. Nickel knows whether he wants to answer as to communications between counsel and himself, and it is a question that he has a right to judge himself, but he must understand that he does not have to answer.

772 Mr. BENJAMIN. You were acting as attorney for Henry Miller, Mr. Treadwell.

Mr. TREADWELL. I was attorney for Mr. Nickel, also.

A. It was of a general nature; he had some talk with Mr. Miller, and he had decided that it was to the best interests that the property be conveyed to Mrs. Nickel and myself.

Q. What were the reasons he had discussed with Mr. Miller that he informed you he had

773 discussed?

A. I am not sure that he entered into any explanations, except that it was for the best interests.

Q. The best interests? Of whom?

A. I was practically managing the property, anyhow.

Q. And the execution of the deed and will made no change, so far as your relations were concerned, to the corporation?

774 A. No, sir.

Q. It placed you in no different position than you had occupied previously?

A. The same thing.

Q. Do you recall,—what were the best interests that Mr. Treadwell discussed at that time?

A. My mind is not very distinct on the subject.

Q. That best that you have,—the best recollection?

775 A. I would not like to draw on my imagination for the conversation.

Q. Just the best recollection that you have?

A. I thought it was the natural thing to do.

Q. For what reason?

A. Because, as I stated, I was managing the property, it was only such a thing as a man would naturally do who was not in condition to manage it himself.

Q. Well, then, do you mean that the transfer
776 was made at this time by Mr. Miller,—the trust deed was made, because he was not in condition to manage his own property?

A. He had not been in condition for some time; he could not get out and see it.

Q. His interests were being served by you and by the others in the corporation, just as they had been for some time?

A. Yes, sir.

Q. Was there anything said specifically by
777 Mr. Treadwell at that time as a reason for at that time making a trust deed when a trust deed had never theretofore been made?

A. I do not recall that conversation.

Q. Didn't it bring to your mind any suggestion as to a reason for making a difference in the method of disposing of the property?

A. Yes, I presume it did, but you asked me what Mr. Treadwell told me,—that is what I say I cannot recall.

778 Q. Wasn't it the desire of Mr. Miller, and didn't Mr. Treadwell so inform you, that the purpose of Mr. Miller in executing the trust deed was for the purpose of stopping his property from going through the probate courts?

A. I don't think so; maybe, but I would not be sure.

Q. Was there anything upon that subject said by Mr. Treadwell to you as a reason why Mr. Miller intended to dispose of the property in
779 this manner?

A. He had had some conversation before with Mr. Miller; as I remember Mr. Treadwell's talk, he had been very much impressed by a speech that Mr. Marshall had delivered——

Q. Marshall?

A. Vice-president Marshall, in which he stated that the government had the right to confiscate property and he advocated putting a large inheritance tax by the United States govern-
780 ment, and I think Mr. Treadwell said he had told Mr. Miller of that talk with Mr. Marshall. It made quite an impression on him.

Q. It made quite an impression on Mr. Miller?

A. Yes. That conversation, as I remember it, was with Mr. Treadwell, but when, I do not know what time I had it.

Q. Did you ever discuss the speech of vice-president Marshall with Mr. Miller himself?

A. I do not think so.

781 Q. Did he ever mention it to you?

A. I do not recall that he ever did.

Q. Did you ever chat with him at all?

A. Not at all.

Q. Did he at any time talk to you, or mention to you the threat or attitude, or policy of the federal government, as announced in Marshall's speech, of confiscating property, or putting a large tax on property?

A. Mr. Miller? I do not recall that I had
782 that conversation with him.

Q. Do you recall or not,—the Marshall speech was the only matter of that kind that was mentioned by Mr. Treadwell to you as a matter he had communicated to Mr. Miller?

A. No, I am not sure; I was quite well aware that the legislature was then discussing a bill, increasing the rates, and it is quite likely that was said by Mr. Treadwell to me.

Q. At that time?

783 A. No; I do not know what conversation Mr. Treadwell had with Mr. Miller.

Q. But these conversations about the Marshall speech and the information that you derived from Mr. Treadwell about the legislature raising rates of inheritance tax, etc., they came along about the same time, did they, approximately?

A. I am not sure they did.

Q. It was during the time that you learned there was some contemplated change of rates?

784 A. I think so.

Q. For the purposes of possibly refreshing your memory upon the subject,—instead of a speech by Vice-president Marshall upon that subject, was it not some address or speech that was made upon the same subject, of Lieutenant Governor Wallace of this state that you had in mind?

A. No, sir; I am very clear about that. Mr. Anderson spoke to me once also about Vice-presi-
785 dent Marshall's speech,—as a matter of fact, I never heard of the speech of Wallace.

Q. Did you gather the impression, or the information, from Mr. Treadwell at that time that the State of California legislature was making a change in the inheritance tax rates?

A. No, but I knew they were.

Q. You knew they were?

A. I do not remember when Mr. Treadwell mentioned it to me,—I could not say,—but I
786 knew they were.

Q. Was that one of the reasons assigned by Mr. Treadwell for making a trust deed as well as a will at that time?

A. I could not answer that question.

Q. Would you say that it was not one of the reasons he assigned for it?

A. No, I would not say that.

Q. He explained to you that it was for the best interests of Mr. Miller that this trust deed be executed?

787 A. Yes, sir.

Q. Did he specify what interests he had in mind?

A. I do not recall that he did, Mr. Benjamin.

Q. You recall nothing upon that subject at all?

A. I do not say that I recall nothing, but I cannot recall any specific conversation I had with him.

Q. Can you recall any of the matter that
788 were discussed in that connection, even though you may not be able to recall the specific language of the conversation?

A. I can only give you the impression,—that was that he had advised Mr. Miller that that was one of the interests that could best be served,—a trust deed to avoid the possibility of great increases in inheritance tax.

Q. Yes.

A. What he told Mr. Miller I do not know;
789 I was not there.

Q. Did you have any discussion with Mr. Miller about the trust deed and the will, after they were executed?

A. I do not recall, but I haven't a doubt that I did,—just when I could not say.

Q. How long afterwards?

A. I could not say, but it was generally about his legacies, one in regard to which he talked about. As I said, the contents of the will

790 did not vary very much, excepting the change as to legacies.

Q. Did he make any changes in the trust deed after it was executed on April 17, 1913?

A. He did not.

Q. Did he discuss the making of some changes?

A. Yes.

Q. Some of the legacies?

A. Yes, he wanted to know if he could not
791 change one of the legacies; I told him no. He was not familiar with legal forms.

Q. He was not what?

A. He was not entirely familiar with legal forms, and he thought it might be done. I told him no, it could not be done, and he sent for Mr. Treadwell and Mr. Treadwell advised him, I understand. I never talked with Mr. Miller on the subject, but Mr. Treadwell told me that he advised him it was not possible.

792 Q. How long after he executed the deed did he discuss this particular matter with you?

A. I think probably a year and a half.

Q. Mrs. Nickel yesterday testified about his sending for the trust deed and re-reading it,—reading it over,—do you recall that incident?

A. No; I was not there.

Q. Did you ever take the trust deed to him for the purpose of discussing the matter with him?

A. No, sir.

793 Q. He did make some changes in the legacies, did he not, subsequently?

A. No, sir.

Q. Did he not add a codicil to the will?

A. I do not think so; I know he did not to the trust deed.

Q. Are you not familiar with the fact that there was a codicil; there was a change of executor of the will,—you are familiar with that?

A. Yes, sir.

794 Q. That was made how long afterwards?

A. I could not tell you, Mr. Benjamin.

Q. Were you present when that was done?

A. No, sir.

Q. Mr. Nickel, I notice that the trust deed refers to shares of capital stock of Miller & Lux, a dissolved corporation as well as to Miller & Lux, Incorporated. The Las Animas & San Joaquin Land Company was a subsidiary corporation of Miller & Lux, was it not?

795 A. The Las Animas & San Joaquin Land Company was a corporation owned,—formed by Mr. Miller, for the purchase of land, entirely independent of Miller & Lux. Subsequently, after he purchased the minority interests, the stock was conveyed to Miller & Lux, and the corporation dissolved.

Q. That was along in about 1912?

A. No, I am not sure; I cannot say the date.

Q. I believe it was 1912. But it was,—the absorption took place somewhere along 1911 or

796 1912, all properties of the Las Animas & San Joaquin Land Company were taken over by Miller & Lux, Incorporated,—all the property were turned over to Miller & Lux, and paid for by Miller & Lux in bonds, were they not; the bonds of Miller & Lux?

A. Bonds issued; yes, sir.

Q. $5,500,000 bonds issued by Miller & Lux?

A. $5,000,000.

Q. Five per cent. bonds?

797 A. Yes, sir.

Q. With those bonds he purchased the stock in the corporation of the Las Animas & San Joaquin Land Company?

A. No, oh, no.

Q. He purchased the property?

A. He purchased the Lux people's interests.

Q. Yes, the Lux people's interest. It was at that time the Las Animas properties were turned over to Miller & Lux?

798 A. No, it was not turned over probably, I should say it was at least two or three years after that time it was turned over. It was operated as a separate corporation. There was a very small portion transferred at that time.

Q. Was there any outstanding stock in the corporation of Las Animas & San Joaquin Land Company, Incorporated, at the time this trust deed was executed?

A. I could not say whether it was after that or not.

799 Q. Uncancelled stock?

A. I could not say whether it was at that time or later.

Q. Was the stock of the Las Animas & San Joaquin Land Company, Incorporated, owned by Mr. Miller personally, or Miller & Lux, Incorporated?

A. Personally.

Q. Owned by Mr. Miller personally?

A. Yes, sir.

800 Q. At the time he executed this trust deed, did he turn over this stock to you?

A. No, sir.

Q. You saw none of that stock?

A. No, sir.

Mr. TREADWELL. You mean certificates of stock.

Q. They were not turned over to you?

A. No, sir.

Q. Did you ever see any of them?

801 A. Personally I do not remember seeing any of them.

Q. What about the stock,—the capital stock of Miller & Lux, a dissolved corporation,—did he ever turn any stock of that corporation, the old California corporation, over to you?

Mr. TREADWELL. By stock, you mean certificate?

A. No, sir,—only the one corporation.

Q. That was the Miller & Lux, Incorporated, —the Nevada corporation?

802 A. Yes, the Nevada corporation.

Q. The shares of the Lux heirs in Miller & Lux, Incorporated, were taken over by Mr. Miller, through the medium of this bond issue also, were they not?

A. That was the primary object of it.

Q. Yes, that was the primary object of it. Were they taken over by Mr. Miller personally?

A. I think not. He was not accustomed to handling them personally.

803 Q. I did not mean exactly in that sense. I mean,—were the shares of the Lux heirs in the firm of Miller & Lux, Incorporated, transferred to Mr. Henry Miller or transferred to the corporation of Miller & Lux?

A. They were transferred to Henry Miller. Personally, I did not attend to these matters. Generally Mr. Treadwell and Mr. Merritt and Mr. Brown attend to these matters. I did not attend to them myself.

804 Q. Mr. Nickel, in discussing the character of treatment that was administered by the physicians to Mr. Miller, you mentioned the fact that he was given medical treatment and massage and matters of that kind. Do you know the nature of the medicines that they prescribed for him?

A. No, I do not know, Mr. Benjamin.

Q. Do you know what he was in the habit of taking,—that had been prescribed?

805 A. Often sedatives to make him sleep, but aside from that, I could not tell you.

Q. And strychnine?

A. Mrs. Nickel said so yesterday, but I could not have told you that before.

Q. Was it not—was there any other character of treatment that you know of that you have not mentioned?

A. None that I know of.

Q. Is it not a fact he very frequently re-
806 quired administration of oxygen?

A. He did the last few days.

Q. Not prior to that time?

A. I think once before only.

Q. When?

A. I could not recall, but I think that possibly oxygen was administered once.

Q. How long?

A. I haven't the slightest idea.

Q. Some considerable time?
807

A. I could not tell you.

Q. Don't you know, as a matter of fact, Mr. Nickel, that occurred several times?

A. I do not think it did.

Q. And you do not recall the fact that that was resorted to at a period of more than two years ago?

A. I cannot tell you when, but I do not recall hearing of it but once before. I do not think it was a frequent occurrence by any means.

808 Q. Do you recall of hearing of it,—when it was, that once you mention, as to when it was?

A. No, I do not.

Q. Approximately when it was?

A. No, I could not tell you.

Q. But it did occur?

A. I think so, that is my impression.

Q. Prior to his death, Mr. Nickel, had Mr. Henry Miller made any transfers of any property to you?

809 A. No, sir.

Q. Or any gifts of any character?

A. No, sir.

Q. Had he made any transfers of property or gifts to your wife?

A. He transferred the house on Laguna street, which he bought with the intention of giving to her, after the earthquake.

Q. What was the purchase price of that house,—do you recall?

810 A. I think $85,000.

Q. The house and furniture?

A. The house and furniture.

Q. And that was transferred by him to Mrs. Nickel?

A. Yes.

Q. Had he made any transfers of property, or gifts of property to any of your children?

A. No, sir.

Q. Prior to his death?

A. None whatever.

811 Q. Or to any other relatives that you know of,—any of his relatives?

A. Only the property that Mrs. Nickel mentioned yesterday, which came through his wife, at her death. Mr. Miller, of course, was one of the heirs and he gave it all to Mrs. Nickel and his daughter-in-law. That is all the property he ever transferred.

Q. Is that the property that is referred to in the will and trust deed before us, as a transfer
812 of certain amount to the daughter or to the wife of his son?

A. Oh, no.

Q. That is in addition thereto?

A. Nothing to do with it.

Q. An additional gift?

A. That is referring to a legacy of $1,000. It has no connection with it. This advance is the estate of Mrs. Miller I am referring to.

Q. The mother's estate?

813 A. Yes. The shares,—I think she died intestate.

Q. After the trust deed was made by Mr. Miller and turned over to you, did you do anything with it except keep it in the safe deposit box?

A. I never saw it until I took it out of the box.

Q. You never took any action on it until the time of Mr. Miller's death?

814 A. I did take action on it. I immediately opened a set of books, and the moneys that were paid to Mr. Miller were charged on the books of Miller & Lux to his personal account; dividends were declared and all of those dividends were credited in this set of books as paid to the trustees, and the payments were made to Miller & Lux every now and then for whatever he drew.

Q. Payments were made through Miller &
815 Lux?

A. Dividends were paid to the trustees; they were paid to Mr. Miller, and the trustees had a set of books opened,—they opened a set of books immediately after they came into possession of the property.

Q. How frequently were those dividends declared; were they large dividends, Mr. Nickel?

A. No; the dividends were to suit the expenditures. They never were more than some-
816 thing like fifteen or twenty thousand dollars on the books of Miller & Lux,—his expenses—and a dividend would be declared to cover them.

Q. How were the dividends paid to Mr. Miller,—by check?

A. By check.

Q. And turned over to him?

A. To the trustees,—checks of the trustees.

Q. Would your wife sign the checks?

A. Yes, she signed, and I signed.

Q. Both of you signed the checks?

817 A. Yes, sir.

Q. Then when did you open this set of books, as trustee, Mr. Nickel?

A. I think it was the month following the delivery of the property.

Q. The delivery of the deed?

A. Yes, sir.

Q. And they were constantly kept up by the trustees?

A. Yes; all the payments are entered in these
818 books; one book, it is just one book.

Q. And you continued to maintain that set of books, to collect the dividends as trustees from Miller & Lux, to pay them out to Mr. Miller by checks constantly, during his entire lifetime down to the time of his death?

A. Yes, sir.

Q. Can you just now recall the last payment made to Mr. Miller?

A. No, I could not.

819 Q. Approximately?

A. Only by reason of the custom. As I said, those dividends were declared every three, four or five months.

Q. By the way, you, as vice-president of the corporation, drew a salary as such officer?

A. Yes, sir.

Q. And as president you also drew a salary?

A. Yes, sir.

Q. Why was not that deed of trust put on record when it was executed?

820 A. I could not tell you.

Q. Weren't you advised not to put it on record?

A. I had some conversation with Mr. Treadwell on the subject. My remembrance is that he advised that it was not necessary.

Q. Was not necessary?

A. He said the delivery of it was all that was necessary,—that is my remembrance.

Q. Was there any reason given at that time
821 for not putting it on record?

A. No, I do not recall any other than he said it was not necessary.

Q. Did the subject of recording it ever come up again?

A. No. It is my remembrance that I asked him why it should not be recorded and he simply said it was not necessary. I do not recall any other reason, but I would not be sure.

Q. The opening of the set of books and col-
822 lection of the dividends on that stock,—the keeping of such dividends in books, and the transfer of those dividends to Mr. Miller's personal account,—they were transferred to his personal account?

A. Yes.

Q. Subject to his personal check?

A. Yes.

Q. And he drew his personal checks against it?

A. They were drawn by Mrs. Nickel.

Q. Whenever he wanted the money?

823 A. He told her.

Q. And she drew a check against it; under his personal control, at his direction, were they, at all times?

A. Yes.

Q. Are those the only things,—the acts, that the trustees performed as such trustees under this trust deed, up to the time of Mr. Miller's death?

A. That is all I recall.

824 Q. William Watt Kerr, the doctor to whom you referred,—has offices at 393 Sutter street,—do you remember?

A. I could not tell you. It is easily found out.

Cross-Examination.

Mr. Treadwell. Mr. Nickel, showing you the deed of trust which has been referred to in your examination, made the 17th day of April, 1913, I would ask you if that is your signature on the

825 last page, acknowledged by Mr. Mason?

A. Yes, sir.

Q. And it is dated the 17th day of April, 1913, and is it,—to the best of your knowledge, that is the day you signed it?

A. It is.

Q. You saw this language: "We, the undersigned trustees appointed by the foregoing deed of trust, hereby accept said trust on the terms therein set forth?"

A. Yes, sir.

826 Q. You understood what that meant, did you?

A. Yes, sir.

Q. You understood that you and your wife were appointed trustees of the trust set forth in that instrument?

A. Yes, sir.

Q. And you then got possession of the trust property represented by the certificate in the Miller & Lux Company?

A. Yes, sir.

827 Q. And as you say,—did you have those transferred to your name on the books of the company, as trustees; have you any recollection of that?

A. I think so; yes.

Q. You deposited them in this safe deposit vault?

A. Put them away.

Q. And you rented this safe deposit vault, yourself and wife, as the trustees, for that pur-

828 pose?

A. Yes, I sent Mr. Brown over and had him rent it.

Q. And from that time on you and your wife had the exclusive custody of that box?

A. Mrs. Nickel had one key and I had the other.

Q. The corporation that is referred to then generally in the deed, known as Miller & Lux, a California corporation, you knew that had been dissolved a great many years before, did you not?

829 A. Yes, sir.

Q. You knew it did not own any property?

A. Yes, sir.

Q. The Las Animas & San Joaquin Land Company,—you knew it had transferred all of its property of every kind to Miller & Lux, did you not?

A. At the date of that trust deed?

Q. Yes.

A. Well, I only knew it by inference; I can-
830 not say as to date when it was transferred.

Q. But you knew that it had transferred all of that property?

A. I have so testified.

Q. You know it has no property?

A. Yes.

Q. That it performs no corporate functions, —has no meetings?

A. Yes; it is dissolved.

Q. Dissolved, as you understand it?

831 A. Yes.

Q. As such trustees, all dividends in that stock you say were paid to you and Mrs. Nickel as trustees from the time of this deed until the present time,—is that correct?

A. Yes.

Q. And you have already said that you had a charge account as trustees; where you charged yourself with those dividends,—is that correct?

A. Yes.

Q. And credited yourself with any amounts you paid to Mr. Miller,—is that correct?

832 A. Yes.

Q. Did you also attend meetings of the stockholders of Miller & Lux, Incorporated, and vote the stock which you held as trustees from that time on?

A. Yes.

Q. They were never voted by Mr. Miller, of course, from that time on?

A. No.

Q. And you also were at the head,—or elected
833 the head the next year, of the corporation yourself, were you not?

A. Yes, sir.

Q. So, then, as director,—you held the two positions of director and president of the corporation, and you were also trustee for the beneficial owners of all the stock,—is that correct?

A. Yes, sir.

Q. So, when you acted for the corporation you were protecting all those interested in your
834 action, were you not?

A. Yes, sir.

Q. And you continued to perform these services during all the time up to the present time?

A. Yes, sir.

Q. Mr. Benjamin asked you if you remembered any particular reason that was stated why the instrument was not recorded other than the fact that it was not legally necessary to do so. You know, do you not, Mr. Nickel, that the property conveyed by this deed of trust was stock

835 in the corporation, personal property,—you understood that, did you not?

A. Yes.

Q. In other words, there was no real estate conveyed by it?

A. Yes, sir.

Q. And do you remember whether or not this was stated at the time that you suggested whether it was necessary to record it, that I said it would be rather embarrassing for Mr. Miller
836 during his lifetime to have all of these numerous relatives, friends and other people, as well as the public know exactly what provision he had made for them while he was still alive?

A. I cannot recall that. I simply remember that I thought it was a natural thing to record a document of that kind, for fear of destruction, but the reasons you gave I do not recall.

Q. I think that is all I care to ask Mr. Nickel.

837 Re-direct Examination.

Mr. Benjamin. Aside from the property which was transferred by the deed of trust, what other property did Mr. Miller own at that time, —at the time he made the deed of trust?

A. I do not know that I can recall all of them. He owned a piece of land at Mount Madonna——

Q. How many acres in that?

A. I think forty.

Q. Forty,—of the value of about what?

838 A. I should say a nominal value. It was reserved for a burial place.

Q. Five thousand dollars?

A. Oh, no.

Q. Not that much? Just a nominal value. What else besides the Mount Madonna property?

A. I am a little tired. If my mind were bright I might recall it. I have an impression that the value of it is something like twenty thousand dollars, but I cannot recall just now
839 the nature and location of the property he had.

Q. Some was located in San Francisco?

A. I could not say.

Q. Let us put it this way,—after the execution of the trust deed did he make any transfers of property or sales of property that he owned?

A. No, he did not.

Q. Then, whatever property he had, in addition to the property that was covered by the trust deed, whatever property he had besides
840 that, remained in him?

A. Yes, that I am positive of.

Q. The estate, then, which is now in course of probate,—the estate of Henry Miller now in course of probate represents that particular property which remained in Henry Miller at the time?

A. All he had not embraced in the trust deed.

Q. Those remained in him?

A. Yes; and he had something like $15,000 on hand at the time of his death.

841 Q. In cash? $15,000 was the remainder that he had from the income he had derived under the trust deed?

A. I would not say $15,000; it may be $10,000.

Q. Whatever the cash was, that was where it came from?

A. Yes.

Q. Prior to the transfer by this trust deed, where did Mr. Miller keep his own certificates
842 of stock in Miller & Lux?

A. You mean certificates of stock owned by the corporation, he did not have any himself.

Q. No,—owned by him.

A. He didn't own any; he didn't have any.

Q. I think you do not understand me, Mr. Nickel——

A. If I understand your question correctly——

Q. Mr. Miller owned stock in Miller & Lux?

A. Yes, sir.

843 Q. That stock was evidenced by certificates of stock?

A. Yes, sir.

Q. Where did he keep those certificates of stock?

A. In the office,—in the vault.

Q. Did he have a private box,—a private locked box in the office?

A. I do not think so; personally, I did not have anything to do with it; Mr. Brown had charge of it.

844 Q. What was the reason for securing a separate and different box in a bank after the transfer was made, for the trustees to put that certificate in?

A. That was the property of the trustees and I did not think,—I thought it very careless,—not a very safe place, and we thought that was the proper place for it,—the best vaults in the city,—fire proof.

Q. The same certificates of stock, represent-
845 ing the same stock Mr. Miller held?

A. I am referring to the trust deed more than the stock.

Q. What became of the certificates of stock?

A. Certificates of stock? One certificate was placed in the safe deposit box by myself.

Q. That was the only reason for getting a safe deposit box outside of the office, was it?

A. I do not know. Mr. Treadwell advised me to have a separate place for it,—that was the
846 one reason that appealed to me, because I said I thought a document like that would be safer recorded.

Q. Did he say why he thought it was more advisable for you to do it that way?

A. I would not be sure, but I have a vague impression that it would show that there was a delivery. That is my remembrance.

Q. Was the trust deed executed in duplicate?

A. I do not think so.

Q. There was only one document executed?

847 A. That is all I had.

Q. Did Mr. Miller have a copy of that trust deed that you know of?

A. I think he did; I think he did.

Q. Did you ever see a copy that he had?

A. I think I read a copy Mrs. Nickel read to me,—a copy that he had given her.

Q. That he had given her?

A. Yes; before its execution.

Q. I mean after its execution?

848 A. I could not say; it may be that Mrs. Nickel retained that copy.

Q. Mr. Miller had given that copy to your wife?

A. I think so, but I would not be sure. I think that is where she got the copy that she read to me.

Q. How long before?

A. Perhaps a month.

Q. Did you and Mrs. Nickel discuss the mat-

849 ter at that time?

A. I think so. Mrs. Nickel does not take much interest.

Q. Did Mrs. Nickel know, or discuss with you, the reasons why it was to be executed?

A. I do not think so; I don't recall that she did.

Q. Do you remember anything she stated to you about the matter at all?

A. I do not.

Q. She did not mention to you what Mr. Miller had said to her?

850 A. I don't know she talked with him on the subject at all.

Q. Yet she had in her possession a copy of the proposed deed,—your understanding is that she obtained it from her father?

A. I think he gave it to her to read.

Q. Without comments, so far as you know?

A. I cannot say whether she had any conversation or not.

Q. I think that will be all, Mr. Nickel.

851 At this hour, 4:35 P. M. the hearing adjourned to Saturday, November 25, 1916, at 10 o'clock A. M.

Saturday, November 25, 1916.
No. 304 Humboldt Bank Building,
San Francisco, California.
10:00 o'clock A. M.

The hearing before inheritance tax appraiser,
852 R. F. Mogan, in the matter of the estate of Henry Miller, deceased, No. 21,686, N. S., department No. 9, probate, Superior Court of the State of California, in and for the City and County of San Francisco, continued from Friday, November 24, 1916, was held at the above time and place.

Appearing for the State of California and John S. Chambers, state controller,

William A. Sullivan, assistant inheritance tax attorney,

853 Hartley F. Peart, special counsel for state controller.

Appearing for the executors and trustees of the estate of Henry Miller, deceased, and as personal representative of Mrs. Nellie Miller Nickel and J. Leroy Nickel,

Edward F. Treadwell.

Appearing for the department of internal revenue, Northern District of California,

A. C. Scott, deputy revenue collector.

854 Thereupon the State of California and said state controller called as a witness:

E. Frank Campbell,

who having heretofore been sworn, testified as follows:

Mr. Sullivan. Your name, please?

A. E. Frank Campbell.

Q. I believe you testified that you were a nurse?

A. I am.

855 Q. A professional nurse?

A. Certainly.

Q. And how long have you been such?

A. Twelve to fifteen years.

Q. Twelve to fifteen years?

A. Yes, sir.

Q. Did you graduate from any particular hospital?

A. Waldeck Hospital, San Francisco.

Q. Did you know Henry Miller in his lifetime?

856 A. Mr. Henry Miller?

Q. Yes.

A. Certainly.

Q. How long did you know him?

A. I knew Mr. Henry Miller about seven years.

Q. Seven years?

A. Yes, sir.

Q. When did you—you first became acquainted with him seven years ago?

857 A. About seven years ago, I guess. Before that I took care of his son, Henry Miller, Junior, I met him first; that was a year after the earthquake.

Q. You first, then, became acquainted with Henry Miller in the year 1907?

A. About that; yes, sir.

Q. And at that time you attended his son?

A. I did.

Q. Henry Miller, Jr.?

858 A. Yes, sir.

Q. Did you subsequently enter his employ in your capacity as nurse, to Henry Miller personally?

A. I did; in his last illness I took him to Paso Robles Springs, for treatment.

Q. What springs?

A. Paso Robles Springs.

Q. When did you first enter his employ, to attend him personally?

A. In his last illness; that was in October, 1910.

859 Q. October, 1910?

A. The 29th or 30th, somewhere around that date.

Q. Did you attend Henry Miller continuously from October 29, 1910, up to the date of his death?

A. I did not. I was away about three weeks before his death.

Q. Then you did attend him continuously from October 29, 1910, up to a period of about
860 three weeks prior to his death?

A. Every day. I was with him every day up to that time,—I never missed a day.

Q. You lived at the Miller household?

A. At 2101 Laguna street.

Q. You lived there?

A. Continuously during that period of time.

Q. During that period of time Mr. Henry Miller was attended by other nurses?

A. By a night nurse; he went on duty at 7
861 o'clock at night.

Q. And his name was?

A. Mr. Joseph Lane.

Q. You were, then, the day nurse?

A. I was the day nurse; from 7 o'clock in the morning to 7 o'clock at night.

Q. And you acted under the directions of some physician, did you?

A. Dr. Morris Herzstein.

Q. Dr. Herzstein was the attending physician at all times?

A. At all times continuously.

862 Q. Other physicians were in attendance at any time?

A. They were called in at different times,—Dr. Kerr and Dr. Moffitt.

Q. What Dr. Kerr is that?

A. There is only one Dr. Kerr; I cannot think of his initials.

Q. William Watt Kerr?

A. Yes, that is the one.

Q. When you first attended Mr. Miller in a
863 professional way, which you say was about the last of October, 1910, where did you find him?

A. He was in bed when I got there,—to the house.

Q. By the way, how did you come to attend him?

A. I was sent to come by Dr. Herzstein, and his daughter, Mrs. Nickel.

Q. So that you found him in bed on your arrival there?

864 A. I did.

Q. In what particular part of the house?

A. In his bedroom upstairs, on the second floor.

Q. Off of his bedroom he had a sitting room, did he?

A. Off of his bedroom was a little hall running into my room,—then he had,—that led into the sitting room, which was built about five or six years ago; he used to go downstairs prior to that.

865 Q. What was he suffering from at the time you called?

A. Rheumatic gout.

Q. How long did he continue to remain in bed after your visit there?

A. He was not confined to his bed at that time at all. Just for probably one or two days,—he got up and sat in a chair; you could not keep him in bed at all; just one or two days at the most, until the last week of his illness.

866 Q. You had an invalid chair there, did you?

A. Yes, a number of them.

Q. And Mr. Miller used to recline in the invalid chair, did he?

A. He did, during those spells.

Q. Was Mr. Miller confined to his home for any length of time on your first trip there?

A. For a number of weeks,—when he had his first attack.

Q. How shortly after your first,—the occa-
867 sion of your employment there in October, 1910, did he first leave the house at all.

A. About three months, I think; pretty near that.

Q. What was the occasion of his leaving the house?

A. Well, he was able to come out; to give him a ride, I think; I took him out into the yard in the invalid chair to give him the fresh air.

Q. Did he,—that was the extent of your taking him out of the house, was it?

868 A. Oh, no; he was out, in fact, all the time after he commenced to go out; he went out every day, for fresh air into the yard, and then he was taken out in the machine for rides.

Q. What type of machine would you take him out in?

A. Pierce Arrow.

Q. Limousine?

A. Limousine at all times.

Q. A closed car?

869 A. A closed car.

Q. He never went out in any other type machine?

A. Once in an open car; that was in the city.

Q. How many trips in the automobile were taken by Mr. Miller from October, 1910, up to the time you left his employ?

A. Hundreds and hundreds; in fact, when he commenced to go out, he hardly missed a day at all,—during the rainy weather he in-

870 sisted upon going out.

Q. Coming to the occasion,—say six months before his death,—how many trips were taken?

A. He had not gone out six months prior to his death, on account of the strain,—it was too much for his back, it made it sore, so that we did not go out.

Q. How many trips were taken in the automobile one year before his death?

A. I could not say that; probably a number,—probably six or eight a year before.

871 Q. Do you remember any specific trip taken by him a year before his death?

A. Out to the beach, the Cliff House, along the boulevard or park, and back.

Q. The trips were confined to San Francisco county alone?

A. Oh, strictly.

Q. Did you at any time take any trips with Mr. Henry Miller out of San Francisco, during the period of your employment there?

872 A. In a machine?

Q. Yes.

A. No, sir.

Q. Did you take any trips by other form of transportation?

A. Yes,—we went by train.

Q. Where to?

A. Gilroy.

Q. At what time?

A. We made a number of trips,—we made

873 three or four trips to Gilroy.

Q. Did you make any trips to Mount Madonna?

A. We went to Mount Madonna,—we went to Gilroy; he had a machine and we made trips to Mount Madonna, went back and forth.

Q. When was the last time you went to Gilroy?

A. About two years prior to his death.

Q. You remember that distinctly, do you?

A. I remember when we went,—certainly.

Q. What time of the year was it?

874 A. In October,—the fall of the year.

Q. And what year would you say?

A. I think it was 1914.

Q. When was the last time immediately preceding that?

A. That was a number of months before,—I think in the spring of the year we were there.

Q. Say about May of 1914?

A. April or May, yes.

Q. 1914. What trip had you made prior to

875 that time?

A. We had been there the year before that, in July the year before.

Q. July, 1913?

A. July, 1913, I think we went down there in 1913,—I think we went to Gilroy.

Q. Had you made any other trips to Gilroy, other than those three?

A. Three or four trips we made to Gilroy.

Q. When was the other trip?

876 A. That was as soon as he was able to travel; after his illness we took him to Gilroy, then we went south to Arrowhead Springs.

Q. That was when?

A. That was four years ago,—four or five years, I think.

Q. Shortly after your employment there?

A. That was,—I think we went the following July.

Mr. Treadwell. To Arrowhead?

A. Yes, to Arrowhead.

877 Q. July, 1911?

A. I think that was the time.

Q. How long did you stay there, how long did you remain at the springs in July, 1911?

A. Four weeks.

Q. Where did you go then?

A. We returned to San Francisco.

Q. How long did you remain in San Francisco then,—continuously?

A. Continuously.

878 Q. As I understand it, you were the day nurse?

A. I was the day nurse.

Q. You were in constant attendance on Mr. Miller?

A. Absolutely.

Q. Did Mr. Miller dictate to his stenographer?

A. Many letters.

Q. When?

A. Up to a year or so before his death he

879 dictated many letters.

Q. Where would he dictate these letters?

A. Well, at first he dictated them downstairs, downstairs in the sitting room; then upstairs where he sat,—after the back sitting room upstairs was built, he dictated them there.

Q. How long would he dictate in the sitting room?

A. Three hours at a time, if you would allow him; I would have to stop him many times and send the stenographer away.

880 Q. Did you have instructions from Dr. Herzstein to do so?

A. I had instructions, and used my own judgment. When I thought he was fatigued or tired, I refused to let him go on further.

Q. What were your instructions from Dr. Herzstein in that regard?

A. Not to let him overdo.

Q. Did Dr. Herzstein assign any reason for those instructions?

881 A. No, just that it would fatigue and tire him out,—a man of his age,—he did not want him to overdo.

Q. Did Mr. Miller have visitors, other than the stenographer, there?

A. He did.

Q. Who were they?

A. Different ones; some of his relatives, and some business men,—a very few business men.

Q. Very few business men?

882 A. Very few.

Q. What particular relatives visited Mr. Miller?

A. His niece from Gilroy.

Q. What is her name?

A. Mrs. Sheldon.

Q. How often did she visit?

A. She only visited about once a year.

Q. Once a year?

A. That is all.

Q. Who else?

883 A. His sister-in-law, Mrs. Robinson, came up occasionally,—once a year.

Q. Mrs. Robinson?

A. Yes.

Q. Where does she live?

A. Gilroy, also.

Q. Who else?

A. Mr. Allen, a distant relative of his, Mr. and Mrs. Edward Allen.

Q. Anybody else?

884 A. Mr. Edward Eyre called to see Mr. Nickel and saw him also and Mr. Frank Anderson, president of the Bank of California.

Q. The only relatives, other than the members of his immediate family, say Mr. and Mrs. Nickel, and possibly Miss Nickel, that visited him, are those whom you have enumerated?

A. That is all.

Q. And you would know the names of any other relatives who might visit?

885 A. Yes.

Q. And your knowledge of the relatives, gained from your daily attendance on him, is limited to those specific ones you have enumerated?

A. Yes.

Q. And they visited him only at the times you have stated?

A. Yes.

Q. How long would they remain?

A. Not over twenty minutes at any one time.

886 Q. Why not,—why did they not remain over twenty minutes?

A. Possibly he had nothing more to say; he liked to see them, talk to them for a few minutes, say he would be glad to see them and probably then he wanted to do something else,—that would end it,—they would leave the house and bid him goodbye.

Q. Did these visits fatigue him?

A. No.

887 Q. How long did the relatives continue to visit him?

A. Up to a year before his death.

Q. You know George W. Nickel, do you?

A. Mr. George W. Nickel?

Q. Yes.

A. Certainly.

Q. And J. LeRoy Nickel, Jr.?

A. I do.

Q. Did George W. ever visit the grandfather?

888 A. Certainly; yes; his grandchildren being in the house, they came in whenever they felt disposed.

Q. How often did J. Leroy Nickel, Jr., visit the grandfather?

A. Not very often; in fact, when he was away most of the year, at school, he only saw him when he was back on his vacation,—he probably came in every morning; if he did not come in the morning, he came in the evening or afternoon, mostly every day when he was home from school.

889 Q. How often did Beatrice Sarah Nickel visit Mr. Miller?

A. She did not see him quite as frequently as Junior,—probably three or four times a week; she saw him at different times around the house, when he was walking through the halls. She would come to his room to sit and talk to him probably not over two or three times a week.

Q. How long would the conversation last?

A. He never talked long with anybody at all,
890 unless it was business, or with the stenographer.

Q. And his business visitors,—business associates, were Mr. Frank B. Anderson, Mr. Eyre, —and who else?

A. That is all I can recall. They would just make calls, that is all,—there was no business transacted with these gentlemen at all,—there was no business transacted with Mr. Eyre at all, —he was a personal friend of Mr. Nickel's and called to see him.

891 Q. What Eyre is that?

A. Mr. Edward L. Eyre.

Q. He is a grain broker?

Mr. Treadwell. A grain merchant.

Q. And what Allen did you refer to?

A. Mr. Edward T. Allen, a relative of Mr. Miller,—on Mrs. Miller's side,—the other side of the family.

Q. And what is his occupation?

A. I do not know; he was retired.

892 Q. Did Mr. Miller confer with any of the staff of Miller & Lux, either superintendents or office managers, at any time?

A. Oh, yes; quite frequently.

Q. How often did he see them?

A. Well, I guess he saw them a number of times; probably two or three times,—he saw Mr. John Dillon and Mr. Rodolph.

Q. That would be once in every two or three months?

893 A. Yes, at the most.

Q. Anybody else?

A. Mr. Treadwell.

Q. How often did he see Mr. Treadwell?

A. Five or six times, maybe.

Q. Five or six times during what period?

A. During his illness. Maybe a few times more; I could not say.

Q. That would be five or six times from the period of 1910?

894 A. It may have been a few more times,—a number of times.

Q. Did he see any other persons connected with Miller & Lux?

A. He saw Mr. Merritt, I think, once or twice.

Q. Mr. C. Z. Merritt?

A. Yes.

Q. Anybody else?

A. I think not; no.

Q. Did he see any of the superintendents of the ranches belonging to Miller & Lux?

895 A. Yes; he saw Mr. Gilcrest.

Q. Mr. Gilcrest?

A. Of the Oregon ranch.

Q. How often?

A. He saw him twice during his illness at the house.

Q. Did he see anybody else?

A. Mr. Wallis.

Q. How often?

A. Five or six times, I should say, during his
896 illness.

Q. When did he last see Mr. Wallis?

A. Over three years ago.

Q. Can you place the time specifically?

A. No, I could not say; he happened to be in the office and would ring up, and he would ask if he could see Mr. Miller, and I would say, if he felt all right,—all right, and he was allowed to come up to the house.

Q. Anybody else?

897 A. He saw some other superintendent,—I cannot recollect his name.

Q. Was it Mr. Ogden?

A. Mr. Ogden; yes.

Q. How often did he see Mr. Ogden?

A. I think only once.

Q. Did you have any instructions from Dr. Herzstein, or from any of the other attending physicians respecting the right of these superintendents, or anybody else, to consult with him?

A. Certainly.

898 Q. What were the instructions?

A. I was to use my own judgment,—if he was feeling all right, passed a good night, they could see,—they always rang up, and I used my own judgment; if I thought it was all right, I allowed them to see him.

Q. Did you consult with Dr. Herzstein as to the length of time that these visits should continue?

A. I certainly did.

899 Q. And what did he say?

A. Use my own judgment.

Q. And what was your judgment in the matter?

A. I never allowed him to talk over twenty minutes or half an hour, although he did lots of times talk for an hour.

Q. Were you present during those conversations?

A. I was not.

900 Q. You were out?

A. I was never present.

Q. You came in attendance you said at 7 o'clock in the morning?

A. I did.

Q. What were your daily duties?

A. Well, they varied, of course. In fact, he was most generally up when I came on duty,—the night man got him up,—he was washed and everything and ready for breakfast when I came on; then he had his breakfast; as soon as he had his breakfast he took the newspapers and com-

901 menced to read them; he sat there and read, and asked me for the "Examiner" or whatever paper he wanted,—the "Chronicle," kept on reading sometimes for an hour, or an hour and a half at a stretch.

Q. He read all the papers, did he?

A. All the morning papers.

Q. And that would be—about what time would he be finished with the morning papers?

A. You never knew,—sometimes more than
902 other times. Somebody would come and—his daughter would come and talk for a few minutes, then he would rake up the paper again and read,—then he might lay the paper down,—then Mr. Nickel would come and say something about the management of the ranches, or business,—and then he would take the paper up again and read.

Q. After he had finished reading the papers, what would next be done?

903 A. He would generally have his lunch by that time.

Q. Did you treat him in any way?

A. No, just gave him medication whenever it was necessary.

Q. You gave him medication?

A. Medication which was necessary at times for his bowels, or heart, or something like that, —circulation.

Q. And then what would be the afternoon routine?

A. Well, when he was feeling all right, we went out about 2 o'clock for a ride; sometimes we stayed an hour, sometimes two,—we stayed out as long as three.

Q. And then you returned home about what time?

A. Half past three or four,—he would lie down and take a little rest, he would lie on the couch, sometimes on the bed,—he would take his coat and vest off,—sometimes his coat; sometimes he would sleep for an hour,—sometimes less.

Q. Then what?

A. He would have the evening paper, and read the evening paper; when he finished that he was ready for supper.

Q. What time would he eat supper?

A. Between five or six, mostly five, or a quarter past.

Q. And at what time would he retire?

A. Well, anywhere between half past seven and eight o'clock.

Q. When would he dictate these letters that you speak of?

A. Well, that was done in the morning,—there was no dictation of letters allowed in the afternoon at all.

Q. And that was under whose directions?

A. Dr. Herzstein.

Q. This routine that you speak of began how shortly after your employment?

907 A. Well, it began as soon as he was able to get around at all,—he was confined for three months, soon after that; in fact, he talked business even before that with Mr. Nickel,—Mr. Nickel most generally came in every morning about eight and talked with him until about eight-thirty, he came in every morning when he was in town.

Q. During your employment there did Mr. Miller visit his office any time?

908 A. I think we visited the office twice that I can remember.

Q. That was when?

A. It is over three years ago; about three years ago.

Q. Can you give us the exact month?

A. No, I could not.

Q. That was the first or last visit you made there?

A. We only made two visits that I have any 909 recollection of.

Q. When was the first?

A. They were both together, within a week of each other, I think.

Q. You were with him at the time, were you?

A. I was.

Q. And, of course, he drove there in his limousine?

A. In his limousine,—yes, sir.

Q. Did Mr. Miller have a particular form of diet?

A. He certainly did.

910 Q. What was the diet?

A. It was semi-solid; I was very particular about his diet, in order to digest his food.

Q. By the way, where did he eat his meals during the period you were there?

A. Always in his sitting room; sometimes in his bedroom; very seldom, in his bedroom.

Q. That was on the second floor?

A. Yes; the second floor.

Q. During the period you were employed by
911 Mr. Miller did he eat his meals at any other place?

A. Yes, downstairs in the dining room.

Q. How often?

A. In fact every day at first,—he had his breakfast, he was ready before seven, in the dining room down stairs, I always had breakfast with him at that time.

Q. He had breakfast down stairs in the dining room?

912 A. Yes.

Q. Where did he have lunch?

A. In the dining room.

Q. Supper?

A. Generally up stairs.

Q. How long did that continue?

A. For many months.

Q. How many?

A. For probably two years.

Q. Two years you say?

A. Oh, yes; easily.

913 Q. You remember the occasion of the elevator being put in there?

A. When the addition was built to the house the elevator was put in; the elevator was put in first and the addition built at the same time.

Q. What was the occasion for putting in the elevator?

A. Dr. Herzstein did not want him walking up and down stairs; he was afflicted with a gouty condition and rheumatism,—it pained him, a man
914 of his age, to go up and down stairs,—it affected his heart.

Q. With respect to the time when the elevator was installed in the building, where did he eat his meals?

A. As I say, he ate them most generally down in the dining room; he used to go up and down in the elevator.

Q. When did he discontinue eating meals down stairs?

915 A. I should say over three years ago.

Q. Over three years ago,—can you place the time specifically, with reference to the installation of the elevator?

A. No, because it was a long time after the elevator was installed.

Q. Over three years before the discontinuance of your connection with Mr. Miller?

A. He might occasionally, now and then, have a lunch down stairs,—most generally if he felt all right,—on his birthday he went down and had his lunch down stairs with the family.

916 Q. Well, so that for the period of three and more years before his death he ate very infrequently, if at all, down stairs?

A. Yes, sir.

Q. And how often would you say, during that period of time, that he did eat down stairs?

A. A number of times.

Q. How many times?

A. About 20 or 30 times.

Q. Twenty or thirty?

917 A. Yes.

Q. And what particular times?

A. Only lunch.

Q. Only lunch?

A. He had breakfast at that time up stairs in the sitting room.

Q. When did he discontinue entirely eating down stairs?

A. I think about a year before his death,—that is all.

918 Q. So that in the two years immediately preceding his death,—two years and more,—he ate down stairs about 20 or 30 times, and that was for lunch only?

A. For lunch only,—yes.

Q. What was the specific form of diet?

A. Well, for his breakfast he would have some grape fruit, or a baked apple, and then he would have cornmeal mush, he would have two poached eggs on toast, and a cup of coffee.

Q. What would he have for lunch?

919 A. Sometimes he would have some broth, some creamed sweetbreads, boiled rice, baked potatoes and some kind of dessert.

Q. For dinner?

A. Why, he would have a big bowl of soup, then he would have some squab, or something like that, or creamed chicken on toast, he would have some dessert. He ate more than the average man,—more than I did. He had three meals at all times, he ate three meals.

920 Q. How long did that particular form of diet continue?

A. That practically continued up to three weeks before his death. He might have spells when he had illness, when he had gout, I would give him a little light diet, some broth or milk toast, that was rare; most generally he had three or four meals.

Q. You say that he had spells now and then?

A. He would have a spell, sometimes, in fact,
921 with his kidneys or his bowels, or something like that. I went very light on his diet then. When he had a little attack of rheumatism I was very careful with his diet,—never gave him any red meat at all.

Q. As I understand it, when you arrived,—came on duty, Mr. Miller would be dressed, would he?

A. The night man was always supposed to stay and get him dressed for me.

Q. The night man would dress him?

922 A. Yes.

Q. And you would undress him?

A. No, I never assisted him,—very seldom.

Q. Who would?

A. The night man,—because I went off duty at seven; I may have a number of times, but not very often,—in fact, he would undress himself.

Q. Do you know of your own knowledge, that he would undress himself?

A. Oh, yes; continuously.

923 Q. Undressed continuously?

A. Oh, yes.

Q. How often did you undress him?

A. Probably a number of times.

Q. How many times?

A. How many times?

Q. In a week?

A. I might have undressed him once or twice in a week. I always put his socks on, his stockings, he wore long stockings,—laced his shoes,

924 that he could not do.

Q. When you came on duty was he dressed or undressed?

A. Dressed, and ready for breakfast.

Q. When you came on duty he was dressed?

A. Dressed.

Q. He was dressed?

A. Dressed.

Q. At all times?

A. Mostly.

925 Q. Did you wait around there after you went off duty?

A. I most generally went out,—sometimes I stayed in the house.

Q. I mean around Mr. Miller's rooms?

A. I never stayed around at all. He was generally in the sitting room when I went off.

Q. And you did not have any occasion to return?

A. Only just to my room.

926 Q. But you did not have any occasion to return to Mr. Miller's rooms at any time?

A. No.

Q. So that you do not know, of your own knowledge, who undressed him or dressed him, do you?

A. Yes, I was there a number of times when Lane got him undressed and ready for bed,—the night nurse.

Q. Consequently you do not know that of
927 your own knowledge, do you?

A. Well, I was not there every night when he went to bed.

Q. And you were not there,—when you came on duty in the morning he was dressed usually, was he not?

A. Up to a year or so, we would pull the shades down and fool him on the time,—he wanted to get up at five or half past five, and in order to deceive him we pulled the shades down and kept him in bed.

928 Q. You would dress him then?

A. I would help Lane,—if he wanted to go away early, I would dress him.

Mr. Treadwell. What do you mean when you say you would dress him?

A. I would put on his stockings, hand him his undershirt and drawers. I would put on his stockings and shoes, hand him his trousers, sometimes button them, see that his suspenders were all right, hand him his vest, and hand him his
929 watch and his coat, also I would hand him his cane,—he was then ready to walk into the sitting room.

Q. When he ate his lunch down stairs you usually ate with him, did you?

A. Most generally.

Q. You were present during the meal, were you?

A. I was.

Q. How did he go down stairs?

930 A. After the elevator was built always in the elevator.

Q. You went from the room,—whether it be the sitting room or the bedroom, as it might be, —to the elevator with Mr. Miller?

A. Always.

Q. And you went down stairs to the dining room with him?

A. Certainly.

Q. And you would remain there?

A. I ate along with him.

931 Q. And then when luncheon was through?

A. Sometimes he would sit in the living room, —sometimes he went back to the sitting room up stairs.

Q. You would go back with him?

A. Yes, sir.

Q. Assisting him?

A. He walked alone,—he needed no assistance whatever, only once in a while. He had a little spell from his rheumatism, I saw that he
932 went along all right, did not stumble on account of the rugs,—they had hardwood floors.

Q. Did you assist him in going up the stairs at all?

A. No.

Q. Not at all?

A. Yes, before the elevator was put in,—we carried him in an invalid chair until the elevator was built, but he objected and the elevator was put in.

933 Q. How often would you carry him up?

A. Carried him down in the morning and up at night.

Q. How often?

A. Every day up to the time of the elevator he walked,—the doctor did not want him to walk, —we made him get into the chair and carried him up.

Q. And how often, for a week, would you do that?

A. Every day.

934 Q. Every day?

A. Yes.

Q. When was that,—what particular year?

A. Right after the year of his illness.

Q. About a year or so?

A. Yes.

Q. How long did you continue that?

A. Only when he had spells of rheumatic gout, he could not put his feet on the floor. His feet would begin to swell, and it would cause him
935 much pain, and we would make him get in the chair and carry him.

Q. Your instructions from the doctor were to stay with him constantly?

A. Certainly.

Q. And did you carry out those instructions?

A. To the best of my ability.

Q. Either you or Mr. Lane were with him constantly?

A. Constantly. If we were not there, Mrs.
936 Nickel or some member of the family,—or the stenographer came, when we withdrew.

Q. But you were at hand?

A. At hand and subject to call.

Q. And when he went on the automobile trips you were always with him?

A. Always.

Q. Who else would go with him on the trips?

A. Sometimes his daughter, if she was not busy, and sometimes Miss Jensca, Mrs. Nickel's nurse, would go.

937 Q. She is also a nurse?

A. Yes.

Q. In attendance on Mr. Miller?

A. No, on Mrs. Nickel.

Q. By the way, you said he went to Gilroy how often?

A. He went to Gilroy three or four times.

Q. You had an automobile down there at Gilroy?

A. It was just generally sent down before.

938 Q. You went by train?

A. Yes, they met us there at the station.

Q. It was the limousine?

A. Yes, in fact we had the touring car there, in the country he generally rode in the touring car.

Q. In town he used the limousine?

A. Always.

Q. How would Mr. Miller get into the limousine?

939 A. He always stepped right in from the porte cochere, we assisted him so he would not fall,—a man of his age,—and we put pillows under his feet.

Q. After he got in?

A. We put some pillows at his back to brace him,—to keep him from slipping.

Q. You would hold his arm?

A. Just assist him into the machine.

Q. And you went with him?

A. Always.

940 Q. You sat alongside of him?

A. He never went riding unless I went along.

Q. And you would be right alongside of him?

A. Not always, I would sometimes sit in front if his daughter or Miss Jensca went along,—if they did not I sat alongside of him. If Mrs. Nickel did not go with him, Miss Jensca sat alongside of him,—he always liked a lady to sit alongside of him.

Q. The persons who usually went with him
941 were yourself,—you always,—or his daughter or Miss Jensca?

A. Yes.

Q. Nobody else?

A. His granddaughter went a number of times.

Q. Miss Beatrice?

A. Yes.

Q. Did anybody else,—his grandson?

A. J. Leroy.

942 Q. His niece from Gilroy was here, or Mrs. Robinson,—did they go?

A. No.

Q. Did George W. Nickel often go with him?

A. No.

Q. J. Leroy Nickel, Sr., did he go with him?

A. I think he went out once.

Q. When was the last time that any of the superintendents of the ranches called on Mr. Miller?

943 A. I think it was three years before his death, that I can remember, that the superintendents of the ranches called on him.

Q. Did you receive any instructions at that time relative to their calling upon him?

A. No instructions whatever,—I used my own judgment.

Q. And your judgment was that they should not call?

A. No, it all depended upon the condition of Mr. Miller at the time,—if he did not have a
944 good night and was not feeling good.

Q. I understood you to state that the last time a superintendent called was three years ago, or more?

A. I think it was.

Q. Well, have you any idea on the subject?

A. No, I never took any notice at all.

Q. Could it have been five years ago?

A. No.

Q. Four years ago?

945 A. No, say less than three years ago.

Q. Less?

A. No specified time, about three years, I should judge.

Q. That would be in the fall of 1913?

A. Around that time I should judge.

Q. And that is the last time any superintendent called on him?

A. The last I can remember, yes.

946 Q. You had the option as to whether they should call or not?

A. I always used my judgment,—Mrs. Nickel would say, "What do you think,"——

Q. Then it was up to you as to whether they should call or not?

A. It was.

Q. Who conferred that authority on you?

A. Dr. Herzstein.

Q. Why, then, did the superintendents discon-
947 tinue calling on Mr. Miller?

A. I could not say. Most generally I would ask him if he wanted to see them, and he generally specified it.

Q. Did any superintendent endeavor to see him subsequent to that occasion, three years ago or so?

A. If they wanted to see him they were allowed to see him, of course.

Q. You said that the last occasion of a visit
948 of any superintendent was some three odd years ago?

A. Meaning the ranch superintendents?

Q. Yes.

A. About three years ago.

Q. Did any of the ranch superintendents endeavor to see Mr. Miller subsequent to that time?

A. That I could not say,—I do not know.

Q. You would know, would you not?

A. Probably I did not answer the phone, I never answered the phone.

949 Q. You said a moment ago that they usually rang you up.

A. No, they rang up the house,—either Mrs. Nickel, if she was at home, they would ask her, or they would come and see me,—they would say, "Mr. Wallis is down at the office, he wants to know if he can come out," or Mr. Gilcrest or whoever it might be,—if Mr. Miller was lying down sleeping, I would say, "I would rather you would not come out."

950 Q. Did you receive any telephone messages of that character or requests of that kind subsequent to three years ago?

A. Previous to that time?

Q. No,—subsequent?

A. Afterwards?

Q. Yes.

A. None that I remember at all.

Q. Not that you remember?

A. No.

951 Q. How often prior to that time would you receive such request?

A. Rarely,—probably once in two or three months, when some superintendent was in town, —seeing something about the sheep or cattle.

Q. But you remember quite distinctly that it was in the fall of 1913 when the superintendents called for the last time?

A. That I can remember of.

Q. And you cannot,—you remember distinctly also, do you, that subsequent to that time,—the

952 fall of 1913, there were no requests of that character?

A. Not that I can remember.

Q. You would remember that, would you not? Well, you had authority to determine whether they could call or not?

A. I did.

Q. And you would know whether requests were made of you?

A. Yes.

953 Q. Was there any particular reason why you should remember that the fall of 1913 was the last time the superintendents called?

A. No.

Q. There is nothing distinctly in your mind which places that time as the last time when they called?

A. No.

Q. You do not know?

A. I could not tell you, to tell you the truth.

954 Q. And who was the last superintendent to call?

A. I think Mr. Wallis was the last superintendent that called.

Q. And how long did he remain?

A. Half an hour, I guess.

Q. Half an hour?

A. Possibly half an hour, yes.

Q. Did you receive any instructions from Dr. Herzstein after the last visit of Mr. Wallis there, relative to the visits of the superintendents?

955 A. No.

Q. Did you receive any instructions on that subject from Mrs. Nickel?

A. No.

Q. Did you receive any instructions on that subject from Mr. J. Leroy Nickel?

A. Never.

Q. Did you receive any instructions on that subject from any person at all?

A. No.

956 Q. Then you used your own judgment respecting the visits of the superintendents?

A. I did in fact to all people.

Q. Did you decline to permit any superintendent to call on Mr. Miller after the fall of 1913?

A. I do not remember that I did.

Q. Did you at any time decline either before that time?

A. Oh, certainly.

957 Q. You did?

A. And——

Q. You remember quite distinctly——

A. And——

Q. Who?

A. Mr. Wallis and Mr. Gilcrest,—in fact, different superintendents.

Q. And you remember about when you declined?

A. I cannot remember, but I remember declining,—they wanted to talk with him and I said, "I do not think you had better."

958 Q. But you remember quite distinctly before that time, declining those people?

A. Yes.

Q. They called about the spring of 1912 or 1913, was it?

A. When they happened to be in town, or they would make a request to see him,—he would ask if different superintendents were in town to let him know, then Mr. Nickel would ring up and say that Mr. Wallis, or whoever it might be,
959 would like to see Mr. Miller this morning.

Q. But you are unable to say at this time——

A. Yes, I am unable to say.

Q. Whether anybody called up after this three year period?

A. I do not really recollect, no.

Q. And you cannot tell us whether you declined to let anybody see him?

A. I do not remember.

Q. But you do remember before that time,
960 quite distinctly, prohibiting from calling on him the people who did ring up?

A. Yes.

Q. Dr. Herzstein would prescribe for Mr. Miller, would he?

A. Certainly.

Q. Different medications?

A. Yes.

Q. What would he prescribe?

A. Whatever he needed.

961 Q. Coming down to the time of your first employment there, what did he prescribe for him at that time?

A. Sometimes fortieth strychnine.

Q. How often would you use strychnine?

A. Might use it, at different periods, every day; sometimes twice a day, sometimes three times a day.

Q. And you would administer it in what form?

962 A. Most generally by mouth.

Q. By mouth?

A. Sometimes he had it hypodermically, but not often.

Q. How long did that treatment continue?

A. All the time I was there.

Q. Was not that a continuous course of treatment?

A. That was.

Q. From the time you first became employed?

963 A. Yes. Sometimes strychnine might make him a little nervous, then I would discontinue that treatment. I used my own judgment,—if he needed stimulation we gave it to him.

Q. If he had what?

A. We gave it to him.

Q. The instructions of Dr. Herzstein were to administer daily,—sometimes two or three times?

A. Yes.

Q. That continued from the time of your first employment there until you left?

964 A. Practically; sometimes we left off.

Q. Intermittently you might leave off?

A. Yes.

Q. For how long a period?

A. A number of times for weeks, we did not give him any at all.

Q. How many weeks?

A. Sometimes two or three months he never had any strychnine.

Q. At a stretch?

965 A. Yes.

Q. How often would that occur?

A. That occurred two or three times.

Q. Two or three times?

A. Yes.

Q. Do you remember distinctly any period of three months when it was discontinued?

A. I think it was around the time we were at Arrowhead Springs,—he had hardly any medication at all then. He took the baths then,—

966 the mud packs.

Q. When was that?

A. Four years ago,—five years ago.

Q. About five years ago?

A. Five, I think.

Q. Do you know any other occasion when strychnine was not administered for three months?

A. No; as I say, he might go along,—if he did not need it we did not give it to him.

967 Q. The only time that you can at this time remember, or the only time when a period of three months elapsed when strychnine was not administered, was on the occasion of this visit at the springs?

A. That was one time. There was a time at the house or at Gilroy when he did not need any at long periods.

Q. How long were you at Gilroy?

A. Say seven to ten days.

968 Q. Seven to ten days?

A. We were there three weeks one trip; we were at Mount Madonna that time, while Mrs. Nickel was in Europe.

Q. And during that time you did not administer strychnine?

A. As I say, a portion of that time we did not.

Q. A portion of that time?

A. One or two days, if he did not need it,—we watched his pulse, we gave it to him if it
969 was low.

Q. Can you mention any other occasion that you can remember distinctly?

A. I do not remember.

Q. You do not remember?

A. No.

Q. The only occasion, the three months period during which strychnine was not administered was this trip to the springs?

A. Arrowhead, yes.

970 Q. The only occasion?

A. That I remember now.

Mr. Treadwell. I did not hear that.

A. We did not use much medication at all, or strychnine, while we were down at Gilroy or Arrowhead; we left Gilroy to go to Arrowhead; we used very little medication at that time.

Q. Now, then, what other form of medication was used?

A. Sometimes he would have nitro-glycerin,
971 —one-fiftieth grain.

Q. How often would you administer that?

A. Might take a spell of two or three weeks at a stretch,—then discontinue.

Q. How often per day?

A. Sometimes twice, and sometimes only once a day.

Q. That course of treatment continued for how long?

A. Practically during his illness.

972 Q. The entire period of your employment there?

A. Yes, sir.

Q. What did you use that particular medicine for?

A. Circulation.

Q. Circulation of the blood?

A. Yes.

Q. What other form of medication did you use?

A. We used suppositories.

973 Q. For what?

A. For sleep.

Q. For sleep?

A. Yes, sir.

Q. And that was used how long?

A. That was practically during his entire illness.

Q. When you speak of his entire illness you mean the period you were employed?

A. Certainly.

974 Q. And what other form of medication?

A. He always had rhubarb pills for his bowels,—always had two compound rhubarb pills every day, most generally a glass of Hunyadi and some saline.

Q. You used these suppositories daily, as I understand it?

A. Yes, I did, at night.

Q. At night. Mrs. Nickel in testifying the other day, as I remember it, said that veronal
975 was administered.

A. Yes, we used veronal at times.

Q. How often?

A. I could not say. We discontinued the use of it because it really depressed his heart, and he was always loggy the next day. He was always sleepy.

Q. When did you discontinue using veronal?

A. I do not think we used any veronal in the last two or three years.

Q. When did you first start in using veronal?

976 A. When he could not sleep. Then we tried tryonal, then we switched to bromial, five grains, or seven grains.

Q. But the use of these last drugs you have mentioned began when?

A. During his last illness.

Q. From its inception?

A. Yes.

Q. What is the use of veronal,—what is it for?

977 A. To produce sleep,—we use it in powder form.

Q. What for?

A. To produce sleep.

Q. You said that Mr. Miller had his good spells?

A. Yes.

Q. And you said that Mr. Miller had his bad spells?

A. Yes.

978 Q. How long would he continue to feel very well?

A. He would go on for weeks and not feel bad at all,—he would have spells when his bowels would not work,—sometimes his food would not digest, his digestion was not perfect, he would have a spell for a day or two, then it would pass over, and he would feel all right.

Q. What would be the result of those spells?

A. Sometimes a little nausea,—a little vomiting spell,—sometimes his liver would not act, he

979 would have acute bile, and that would make him quite sick for a day.

Q. Would his temperature rise?

A. During his rheumatic condition, certainly.

Q. And the pulse?

A. Of course, the pulse naturally would.

Q. These spells would continue for how long?

A. They varied at various times. He might not have a spell in months,—when the spell would come on we would give him pills, some
980 liver pills of some kind.

Q. Dr. Herzstein would be called in when these spells came on?

A. Dr. Herzstein called every day.

Q. Every day?

A. Practically,—he might miss a day,—every day when we were in town.

Q. And when you say every day, you refer to this period between 1910 and the date of Mr. Miller's death, or the time of the length of your
981 employment?

A. Yes.

Q. His attacks were confined purely to stomach trouble?

A. Yes.

Q. Irregularities?

A. Irregularities from the liver, I say practically from the liver, at times like that.

Q. And that was the only attack of that form?

A. He might have a little heart spell sometimes.

982 Q. How often would he have a heart spell?

A. Not very often.

Q. How often?

A. Probably the last year,—four or five attacks.

Q. Before that did he have any attacks?

A. No, just at the commencing of his illness, during the gouty condition, that affected his heart, of course.

Q. And it affected his heart, in 1910?

983 A. Yes.

Q. To what extent?

A. Well, his heart became weak, of course, and he needed more stimulation.

Q. I beg pardon?

A. He became weak and needed more stimulation.

Q. And that was the occasion of your administering strychnine constantly?

A. Yes; and nitro-glycrine also.

984 Q. From the year 1910, then, did he have frequent bad spells of the heart?

A. No, not so much with his heart at all; most generally from the liver,—that was what we had to watch.

Q. Did he have fainting spells?

A. No.

Q. At this time?

A. Never had a fainting spell in his life while I was with him.

985 Q. How often would you take his temperature?

A. We went along for weeks and never took his temperature.

Q. Did you keep a chart of his condition?

A. Certainly.

Q. Have you the chart?

A. No.

Q. Have you them now?

A. Dr. Herzstein has.

986 Q. Did the night nurse keep a chart?

A. It was all on one chart; a chart was kept continuously all the time.

Q. How often were consultations had with doctors other than Dr. Herzstein?

A. Two or three different times, about three times with Dr. Moffitt, Dr. Kerr and Dr. W. S. Thorne.

Q. What was the occasion of consultations with Dr. Kerr and Dr. Moffitt?

987 A. He would have one of those spells.

Q. Spells of what character?

A. Stomach.

Q. Stomach?

A. The liver.

Q. Did I understand you to say that the only occasion when Dr. Kerr was called in consultation was when Mr. Miller had stomach trouble?

A. No, he also had a complete stop of circulation in the right leg; I think it was, that was during his gouty condition. We gave him soda baths at that time.

988 Mr. Treadwell. What time?

A. That was at the commencing of his illness.

Mr. Treadwell. 1910?

A. Yes.

Q. Did he have any paralytic strokes?

A. Never.

Q. How often,—let me get this accurate,—again,—how often was Dr. Kerr called in with Dr. Moffitt?

989 A. I think Dr. Kerr was there twice,—Dr. Moffitt was there three times.

Q. And Dr. Thorne?

A. Dr. Thorne was there once.

Q. And when was Dr. Thorne there?

A. At the same time Dr. Moffitt.

Q. When was that?

A. Commencing at the first,—1910.

Q. 1910?

A. Yes.

990 Q. When did they come again?

A. I do not know. I think it was a year or so afterwards Dr. Moffitt came,—Dr. Kerr was out of town and we called Dr. Moffitt.

Q. When was that?

A. I do not know exactly; probably a year or so afterwards.

Q. When Mr. Miller had these little spells that you have indicated, or these spells, would he retire to bed?

A. He would go to bed for a time being,—that day, he was always up the next morning,—

991 he would never stay in bed,—he had to be dressed and would sit in his chair.

Q. He was always in the chair?

A. He would never lie in bed.

Q. Even at a time he had temperature?

A. Even then. If it got to 103 or 104, he would still be sitting in the chair.

Q. He would still be sitting in the chair?

A. Yes.

Q. Is Dr. Kerr a general practitioner?

992 A. He certainly is.

Q. Does he specialize on any form of disease?

A. General consulting physician. Strictly medical,—not surgical, I don't think.

Q. When Mr. Miller would dictate these letters where would he dictate them?

A. First he dictated them down stairs in the living room, afterwards when the sitting room was built up stairs, he always dictated up stairs.

Q. In his own sitting room?

993 A. Yes; in the front room sometimes.

Q. Front room,—where?

A. The front room,—in Mrs. Nickel's bedroom.

Q. Where would you be during the time the dictation was going on?

A. Around the house. If he wanted me he would ring the bell, or Miss Thomas would call me. If she stayed too long, I would come in and say it was time to go.

Q. When did he discontinue dictating?

994 A. I do not think he dictated a year and a half or two years ago, about that time, I think. I think his last dictation was about two years ago.

Q. When did he first start in to dictate letters?

A. Just as soon as he got over the first attack of his gouty rheumatic condition,—three months after the first attack.

Q. That would be in the early part of 1911?

995 A. I think in February he commenced.

Q. By the way, on this trip to Gilroy he—you say he took three or four trips down there?

A. Yes.

Q. Who accompanied him other than yourself?

A. Mrs. Nickel always went along except one time she was in Europe; just took Miss Jensen, the night nurse and chauffeur.

Q. On that particular trip there was the

996 night nurse, Miss Jensen and the chauffeur and yourself?

A. That is all.

Q. And Mr. Miller?

A. That is all.

Q. When you were at Gilroy where did you live?

A. At the farm,—Bloomfield Farm.

Q. Mr. Miller had his private rooms there, did he?

A. Yes.

997 Q. How long did you stay there?

A. We stayed at Bloomfield anywhere from seven to ten days.

Q. Seven to ten days?

A. Except once when we stayed a month,—before we went to Arrowhead,—four weeks.

Q. On the first trip you took to Gilroy?

A. It was after,—it was in July, 1911, I think we went first,—after we went for a month,—went from there right to Arrowhead.

998 Q. In July, 1911?

A. July, 1911.

Q. You took the first trip?

A. Yes.

Q. Who accompanied Mr. Miller on this occasion?

A. The night nurse and Mrs. Nickel and Miss Underwood, who was nurse for Mrs. Nickel at that time; she went with us to Gilroy, and one of the maids in the house and the chauffeur.

999 Q. And yourself?

A. And myself.

Q. Who did Mr. Miller see, if anybody, at that place?

A. He saw his relatives, Mrs. Robinson, Mrs. Sheldon, the superintendent, assistant superintendent, and he saw one or two of the ranchmen,—in fact, a number of the old men on the ranch came around and talked to him, and he rode all over the ranch.

Q. In an automobile?

1000 A. In a Renault, a French car, every day for two hours, in the morning or afternoon.

Q. You were with him always?

A. He never went out without me.

Q. Did Mr. Miller transact any business on that trip?

A. Oh, yes; the stenographer came down from the city.

Q. Did he transact any other kind of business?

1001 A. I do not know.

Q. You were with him constantly and you would probably know?

A. Probably so.

Q. What was the next trip that he took?

A. The next trip to Gilroy? We went to Mount Madonna.

Q. When was that?

A. The next spring.

Q. That would be about May, 1912?

1002 A. I should think around there.

Q. How long did you stay there?

A. Seven days on that trip.

Q. Who accompanied you?

A. The same, Mrs. Nickel, the night nurse and chauffeur and Mrs. Nickel's nurse.

Q. What did you do there then?

A. Nothing,—just rode over the ranch, the land of the different ranches that included the division there.

Q. In the automobile always?

1003 A. Always.

Q. Mr. Miller never went out except in the automobile?

A. He walked around Bloomfield Farm garden, went around the little butcher house where they kept meat for Bloomfield Farm.

Q. You were with him then?

A. Always.

Q. Did he transact any business there at that time?

1004 A. Oh, yes, he dictated those letters.

Q. Did he see anybody?

A. He saw his superintendent, Mr. Barney, the superintendent of the ranch at that time.

Q. In 1912?

A. Yes.

Q. Anybody else,—did he see anybody else?

A. His relatives, Mrs. Sheldon and Mrs. Robinson.

Q. As I understand it, you had authority as

1005 to who should see him or not,—they had to get your permission?

A. Certainly.

Q. So you would know who he saw. He saw Mr. Barney,—none other?

A. He may have seen somebody from town, I think on one trip he saw a Mr. Fitzgerald.

Q. The attorney?

A. I think so, about some land,—I do not recall now.

Q. But that was all?

1006 A. He saw his superintendent from Mount Madonna,—different places have different superintendents,—assistant superintendents, he would see them, would go to the drier,—he saw men in regard to drier,—Mr. Thomas on the old Gilroy farm place he had,—on all his visits there he went over his land at Gilroy and in that vicinity.

Q. The next trip was when?

A. We went to Gilroy and then to Mount Ma-
1007 donna while Mrs. Nickel was in Europe,—I forget what year that was,—four years ago I think. We stayed there——

Q. That would be in the fall of 1912?

A. Yes, I think it was in the fall.

Q. How long did you stay there then?

A. For over three weeks,—we stayed most of that time at Mount Madonna,—took trips to Bloomfield Farm,—stayed over night and all next day,—it was very windy at Bloomfield Farm,
1008 the climate was far better for him up in the mountains.

Q. Who accompanied him on that trip to Mount Madonna?

A. Miss Jensea and the night nurse and the chauffeur and myself.

Q. Who?

A. Mrs. Nickel's nurse and the night nurse and the chauffeur and myself.

Q. On that occasion did he dictate any letters?

1009 A. Yes.

Q. He had a stenographer?

A. Yes, came from the city and stayed there.

Q. Did he see anybody else?

A. Mr. Marquart, the superintendent.

Q. Anybody else?

A. His niece stayed a day or two, his sister-in-law Mrs. Robinson came and stayed in one of the cottages.

Q. Anybody else?

1010 A. No.

Q. That is all you can remember?

A. Yes.

Q. When was the next trip to Gilroy?

A. We made one more trip afterwards; after Mrs. Nickel came back from Europe, we went to Gilroy and stayed three or four days.

Q. How long after Mrs. Nickel came back?

A. I think it was in the spring of the following year.

1011 Q. That would be about May, 1913?

A. I think it was around May; as soon as the weather was agreeable,—I think we made one.

Q. In the spring of 1913 that would be, Mr. Campbell?

A. I think it was.

Q. That was the last trip you made?

A. I think it was.

Q. Who accompanied you on that trip?

A. Mrs. Nickel, Miss Jensca, Mr. Lane and myself, and the chauffeur.

1012 Q. Did he see anybody on that trip?

A. Just as usual, Mr. Barney, the superintendent of the ranch, that is about all.

Q. Nobody else?

A. One or two of the ranch hands, an old Spanish man named Castro, he might have seen him.

Q. Did he dictate any letters on that trip?

A. No, we did not stay long enough. He probably wrote three or four letters,—he wrote
1013 letters at different times himself.

Q. But that was the last trip he made out of San Francisco?

A. It was his last trip out of San Francisco.

Q. On his last trip to Gilroy of course he drove around the farm in the spring of 1913?

A. Yes.

Q. And you were with him all the time?

A. Yes.

1014 Q. Did he get out of the machine at all?

A. Yes.

Q. Did you held him out?

A. Whenever he got out of the machine, so that he would not fall?

Q. You helped him?

A. Just assisted him, because he used his cane.

Q. Now, then, you returned to San Francisco, of course?

A. Yes.

1015 Q. And you drove around in the limousine at different times?

A. In fact every day.

Q. You would be with Mr. Miller all the time?

A. Yes.

Q. Did Mr. Miller get out of the machine?

A. Yes, generally he got out at the Cliff House, he would have some chocolate and toast, or coffee, something like that.

1016 Q. And you would be with him? And you would assist him?

A. If I did not the footman at the Cliff House would take his hand.

Q. Mr. Miller carried a cane?

A. He always used a cane.

Q. Always?

A. Always.

Q. From the conception of your employment?

A. Yes.

1017 Q. Did he use crutches?

A. Never.

Q. How many canes did he use?

A. Just one.

Q. These trips in San Francisco continued up to what time?

A. I think a little over a year it is since we went out. We went out after the fair closed,—we went out three or four times after the fair closed. We went out to the fair grounds after the fair closed.

1018 Q. Did he visit the exposition himself?

A. Certainly.

Q. How often?

A. I do not know, say 12 or 15 times.

Q. Twelve or fifteen times?

A. Something like that.

Q. Did he get out of the machine at the exposition?

A. Never; once he did, to go to the toilet.

Q. What particular part of the Exposition
1019 did he go to?

A. Anywhere the machine was allowed. We had a permit to drive up the Marina.

Q. Did he have any specific object?

A. No, naturally he wanted to see the grounds. He was a man who always liked to see people.

Q. Did he go to the stock farm?

A. Invariably, always,—we drove around wherever we could.

1020 Q. He never got out at the stock farm?

A. He never got out to see the cattle or horses; he never got out of the machine; we just drove as close as we could to where they were.

Q. Was he interested in the stock there?

A. Yes, indeed.

Q. Did he discuss it?

A. He would say if he thought they were any good or not.

Q. He didn't get out to look at the stock?

A. No, they were in sheds and barns.

1021 Q. Why didn't he get out?

A. It was too fatiguing to get in and out of the machine.

Q. Had he been in the habit of getting out of the machine at all previous to that time?

A. Yes, when we went to the Cliff House. If we went to the Cliff House, to the boulevard or around the Presidio or something like that.

Q. How often would he get out at the Cliff House?

1022 A. He would take spells. He might get out every day.

Q. When did you last go to the Cliff House?

A. Two years ago I think. I don't remember.

Q. In 1914?

A. It is two years since we went to the Cliff House.

Q. That was the last time he got out at the Cliff House?

A. Yes.

1023 Q. Did he get out at any other place?

A. Down on the boulevard, to go to the toilet.

Q. When he had to?

A. Yes.

Q. But otherwise not?

A. No.

Q. When did he last get out for any other purpose than necessity?

A. Fully two years ago I should judge.

Q. About two years ago?

A. Yes.

1024 Q. And before that time he had gotten out regularly, had he?

A. Oh, yes, regularly.

Q. Did there come an abrupt stopping to his getting out of the machine?

A. Not at all.

Q. It was just gradually?

A. Well, I would say, "Do you want to go to the Cliff House", something like that, to get something to eat or drink. Sometimes he would
1025 not. He would say, "Let's ride down to the end of the boulevard and let's ride back, I don't think I want anything to today", or something like that.

Q. Did he stop getting out of the machine at one time? Or did his getting out of the machine cease gradually?

A. It ceased gradually. As I say——

Q. And when did the cessation commence?

A. I say, about two years ago.

1026 Q. About two years ago?

A. I should judge so; it might not have been quite so long; I couldn't say.

Q. Two years from the cessation of your employment?

A. Yes.

Q. That would be about September, 1914?

A. It might have been later than that, we went to the Exposition, out to the Cliff House once or twice. I could not say,—we could come around that way, by the Cliff House, he might say, "Let's stop and have some coffee", we

1027 would stay twenty minutes to half an hour,—he would get back in the machine and ride down the boulevard and come home.

Q. How often did you say that he visited the stock exhibit at the fair?

A. Every time we went to the Exposition,—we always rode down by the stock exhibit.

Q. And he would discuss the stock exhibit with you, of course?

A. No, he would not discuss it very much,—
1028 he would say they are good looking cattle, or if they were weighing the cattle, or weighing the horses, he might just say that.

Q. He displayed a good deal of interest in the cattle, of course?

A. Always.

Q. But he did not get out of the machine?

A. Never, at the Exposition.

Q. You said that Mr. Miller wrote letters in longhand, Mr. Campbell?

10[illegible] A. Oh, yes.

Q. And when did he stop writing letters in longhand?

A. He stopped over two years ago. He attempted to write a number of different letters,—he was not able to; what I meant was, it tired him to write the letters, as naturally his hand was shaky, like that (indicating) and he was not able to do the same. He was able to write his signature,—sign anything.

Q. Do you know specifically when he stopped writing letters?

1030 A. I would not remember now at all. Only two or three weeks before the time I left he wanted to write,—attempted to write just a few lines, and he said "I could not do it, my hand shakes too much". He wanted to lots of times when we would not allow him to.

Q. Did he continue to write letters after the stenographer first called?

A. Yes,—personal letters to his niece, Mrs. Sheldon, in Gilroy and personal letters of a few
1031 lines.

Q. But he discontinued writing letters, even to his relatives, about two years ago?

A. Yes. Most generally he wrote to his grandson once in awhile?

Q. George W.?

A. J. LeRoy, Jr., at college.

Q. When did the stenographer first begin to call at the house?

A. Three or four months after his illness.

1032 Q. When did she first call there? 1912?

A. February, 1911.

Q. When did she cease calling there?

A. I could not say; six months or so, I think, nine months before,—maybe a little longer, I should say from nine months to a year,—she may have been there once or twice in that time.

Q. Before you left?

A. Yes.

Q. That would be about either September, 1915, or the early part of 1916?

1033 A. Around that time, between that time, anyway.

Q. You were more or less of a companion to Mr. Miller, were you?

A. I was not a companion, I am a professional nurse; he never had any companions. He was not a congenial man,—just wanted to meditate.

Q. Did you read to him?

A. No, he always read to himself; there was
1034 very little reading done to him.

Q. Would he discuss matters with you,—little topics?

A. He discussed very little. He might mention something, certain number of acres on a ranch. I would ask about a certain ranch, I would say how many acres have you there, and he would tell me.

Q. Did he discuss sales of land with you, or anything of that character?

1035 A. Never with me.

Q. Did he ever tell you about horses or cattle, or things of that sort?

A. No, unless I heard him say, if I was around there, how many cattle or sheep, or how many horses, or something like that, but otherwise never; not with me.

Q. When did you discuss with him the number of acres that he had.

A. I suppose it might have been at various times; I might talk about a certain ranch, or

1036 something, and I would ask about a piece of land, I would ask how many acres have you there, he would say "I have so many".

Q. When was the last time you discussed that?

A. It might have been about a month or six weeks before his death; it might have been a few days before I left, I might have talked with him.

Q. What particular ranch did you talk about
1037 to him?

A. I do not remember,—I think some ranch in Kern county.

Q. That was the only ranch you discussed with him?

A. No, we discussed Bloomfield, Mount Madonna.

Q. Discussed it in what way?

A. Just talked about the ranch, what the acreage was.

1038 Q. What he was raising on it?

A. No, I never discussed that,—I probably knew.

Q. So you would discuss acreage only?

A. That was all,—probably would ask what acreage he had there.

Q. Did you discuss the number of head of cattle on the different places?

A. No, I do not think we did. I might have heard him discuss it,—about how many head of cattle he had on a place, but I never asked him.

1039 Q. Did Mr. Miller ever discuss any of his affairs with you?

A. No.

Q. Other than when you asked him those particular questions?

A. No.

Q. And he would simply answer your questions?

A. No.

Q. Would he volunteer anything himself?

1040 A. He might ask me questions,—something like that,—something of that kind,—carry on a general conversation.

Q. But it would only be when you asked him a question that he would discuss his affairs with you?

A. He would not discuss his affairs at all, unless I asked him how many acres have you got there, Mr. Miller, or something of that kind.

Q. You were in the employ of Mr. Miller

1041 on April 17, 1913, were you?

A. I was.

Q. Do you remember the occasion of the execution of the will and deed, here?

A. I do.

Q. You were present in the house at that time?

A. I was.

Q. Who were present beside yourself?

A. I think in the house there was Mrs. Nickel,—I think Miss Jensca was there.

1042 Q. Who else?

A. The help was in the house, of course,—nobody else.

Q. Nobody else?

A. No.

Q. What time of the day was the will executed?

A. I think it was in the morning, sometime around eleven or twelve o'clock; I could not say exactly now. Business or anything like that,—
1043 papers,—was generally done in the morning,—I never allowed any business transaction in the afternoon.

Q. You were in attendance in the room there, were you?

A. I was.

Q. Who called to see Mr. Miller at the time?

A. Nobody called that I know, unless the notary; I do not know whether he was there or not. He was, of course.

1044 Q. Had anybody called previous to April 17, 1913, respecting this will and deed?

A. No.

Q. Had you seen Mr. Treadwell there at all?

A. If he wanted to see Mr. Treadwell, he would say to Mr. Nickel I would like to see Mr. Treadwell. I don't know how many times Mr. Treadwell came. The maid would say, "Mr. Treadwell is here", and I would ask him if he wanted to see him, of course.

Q. Do you know whether Mr. Treadwell had called prior to April 17, 1913?

1045 A. He called at different times, of course.

Q. About that immediate time?

A. If he wanted to know something like that, he would say "I would like to see Mr. Treadwell", he would say to Mr. Nickel, "When he is in town I would like to have Mr. Treadwell come out here, if he is not too busy".

Q. Do you remember this date,—April 17, 1913?

A. I do not know this; I remember when I
1046 was asked to come in and sign the will.

Q. You remember that particular signing?

A. I do.

Q. And you cannot tell us whether Mr. Treadwell called on Mr. Miller prior to that day?

A. Of course he did.

Q. In the immediate vicinity of that day?

A. Not that I remember.

Q. You do not remember?

A. I do not remember.

1047 Q. When Mr. Miller would be reading papers,—newspapers and things of that character,—you would be around, of course?

A. I sat around and read myself.

Q. And you would observe what he would be reading?

A. The Argonaut, Town Talk,—something like that.

Q. Did you ever see him read letters.

A. Oh, yes. He requested to have some of the letters sent out,—he would probably read ten or fifteen letters a day.

1048 Q. And you would be around?

A. I saw him when he had the letters,—certainly.

Q. Did you ever see him reading the will and deed?

A. No, I think not.

Q. You did not?

A. He might have read it in the house and I would not know anything about it. I would go out of the room and he would say "If I want you
1049 I will ring the bell".

Q. How long a stretch would you be out of the room?

A. Half or three-quarters of an hour at a time,—probably longer if the stenographer, Miss Thomas came, I would say I will be either in the kitchen, or upstairs, or if they were upstairs, she would leave him and call me.

Q. You remember the incident of this execution of the will?

A. I was called to sign the will.

1050 Q. You were in attendance in the room that morning?

A. In the sitting room.

Q. Who called there?

A. Nobody called, I think only Mr. Mason.

Q. Just Mr. Mason?

A. That I remember; no others.

Q. When did Mr. Mason call?

A. I would say around eleven.

Q. When did he leave there?

A. After he signed the will.

1051 Q. How long was that?

A. Less than ten minutes.

Q. Mr. Mason was the only person called into the room?

A. While I was there,—yes.

Q. Nobody else?

A. No.

Q. Mrs. Nickel?

A. Not at that time.

Q. Mr. Nickel?

1052 A. No.

Q. That is, during the ten minutes from the time Mr. Mason called, until the will was signed?

A. Mr. Nickel was not in the house.

Q. Mr. Mason was the only person in the room?

A. Miss Jensca was there.

Q. Miss Jensca?

A. She signed first and I signed afterwards.

Q. The only persons in the house at the
1053 time were Mr. Mason, Miss Jensca,—that is, in the room,—while the will was executed.—Mr. Mason, Miss Jensca and yourself?

A. That is all.

Q. Nobody else?

A. Not that I remember,—nobody at all.

Q. You would remember?

A. I certainly would.

Q. And those were the only three persons in the room when the will was executed?

A. The only persons in the room when I signed the will.

1054 Q. And that transaction occupied ten minutes?

A. Yes, at the most. I do not think Mr. Mason was in the house over fifteen minutes altogether.

Q. How many papers did you witness?

A. I could not say how many papers. I think one.

Q. Once only that you remember?

A. Yes.

Q. That was the only time you witnessed Mr.
1055 Miller's signature?

A. What's that?

Q. How many times did you witness Mr. Miller's signature?

A. Once or twice,—he made a will before.

Q. Previous wills?

A. I say he made a will before that,—the last will.

Q. On the occasion before who was present?

A. I think Miss Jensen signed that will also.

1056 Q. Do you remember the occasion of the previous will?

A. No, I do not.

Q. You do not remember it at all?

A. No.

Q. How many papers all told did you witness of Mr. Miller's?

A. That I could not say.

Q. You do not know?

A. I do not know. I think only two.

Q. It could not have been twenty, of course?

1057 A. No.

Q. You were not in the habit of witnessing Mr. Miller's signature?

A. No.

Q. So you would remember what you did witness, would you not?

A. Certainly.

Q. Those were just two instruments that you remember of?

A. Yes.

1058 Q. You cannot tell us at this time about the first instrument?

A. No.

Q. You do not know anything about it?

A. No.

Q. Do you know when it was signed?

A. No, I do not remember the date at all.

Q. Do you remember the time of day?

A. I know it was the morning.

Q. Do you remember who was present?

1059 A. I am positive Miss Jensea was present.

Q. You are positive of that?

A. Yes.

Q. How long did that transaction occupy?

A. About the same time.

Q. Ten minutes?

A. Yes.

Q. Who called?

A. Mr. Mason, I think that was all.

Q. Just Mr. Mason?

A. Yes.

1060 Q. The only persons present at that time were Mr. Miller, Mr. Mason, Miss Jensca and yourself?

A. Yes.

Q. The same as the second time?

A. Yes.

Q. You would know, of course?

A. Yes.

Q. Nobody had access to the room except by your permission?

1061 A. Yes. Nobody came to the room unless they spoke to me first.

Q. But are you in a position to say at this time that the only persons present were those you have indicated?

A. Certainly.

Q. And the same people who signed the last will?

A. Yes.

Q. And on this first occasion Mr. Mason

1062 called first,—is that correct?

A. Mr. Mason called first.

Q. On each time?

A. Yes.

Q. And he was the only one that called?

A. Yes.

Q. And how do you know that he was called?

A. I do not.

Q. He just came up himself?

A. He was announced,—it was announced that Mr. Mason was here, Mrs. Nickel said "He is a notary public".

1063 Q. What did you do then?

A. I withdrew from the room.

Q. You let Mr. Mason stay there?

A. I withdrew from the room.

Q. That is all.

Cross-Examination.

Mr. TREADWELL. Mr. Campbell, I want to ask you one or two questions so as to get this clear,—these different occasions that you have in your mind. I show you an instrument that is re-
1064 ferred to as a codicil to the last will and testament of Henry Miller, dated the 4th day of June, 1913, which is signed by E. Frank Campbell as a witness and also by Elizabeth A. Jensca, as a witness.

A. Yes, sir.

Q. You recognize that signature there as your own?

A. Yes, sir.

Q. And you know that you did sign that?
1065 A. I did.

Q. And that Miss Jensca signed?

A. Yes.

Q. On the 4th day of June, 1913?

A. I do.

Q. And you say that I was not there on that day?

A. I do not remember; I do not think you were.

Q. Now, I show you another instrument, dated the 17th day of April, 1913,—four months before,

1066 also signed by Henry Miller and witnessed by James Mason, E. Frank Campbell and Edward F. Treadwell.

A. Yes, I remember that.

Q. You remember that also?

A. Yes, that was signed in the front room, I think,—I think that was signed in the front bedroom.

Q. At any rate, you remember that Mr. Mason was there, that you were there, and that I was

1067 there?

A. I do.

Q. And that we were in the same room at the same time?

A. I do.

Q. But at the time this codicil was signed, as far as you remember, I was not there?

A. I do.

Mr. Peart. Those are photographic copies?

Mr. Treadwell. Yes.

1068 Q. Now, even prior to this time had you witnessed another will for Mr. Miller?

A. I think I did.

Q. You have that in mind also?

A. Yes, I have.

Mr. Treadwell. That is all.

Redirect Examination.

Mr. Sullivan. Let me ask one or two questions before you go, Mr. Campbell. The paper

1069 that you refer to as having been signed in the presence,—when Mr. Treadwell was there, Mr. Mason was there and the one that you signed with them,—where was that signed?

A. They were signed in the front bedroom.

Q. In the front room?

A. I think Mrs. Nickel's bedroom, if I am not mistaken,—I would not be positive whether it was or not. I think that one was signed in the front room,—the other was signed in the
1070 sitting room.

Q. All right. That will be all.

At this time (12:05 P. M.) the hearing adjourned until Tuesday, November 27, 1916, at 11 A. M. when the witness is to return for further examination.

1071

Tuesday, November 28, 1916.

No. 303 Humboldt Bank Building

San Francisco, California

11:00 o'clock A. M.

The hearing before Inheritance Tax Appraiser R. F. Mogan, in the matter of the estate of Henry Miller, deceased, continued from Saturday, November 25, 1916, was held at the above time and place.

1072 Appearing for the State of California and John S. Chambers, State Controller,

William A. Sullivan,
Asst. Inheritance Tax Attorney, and
Hartley F. Peart,
Special Counsel for State Controller.

Appearing for the executors and trustees of the estate of Henry Miller, deceased, and as personal
1073 representative of Mrs. Nellie Miller Nickel and J. Leroy Nickel,

Edward F. Treadwell.

Appearing for the Department of Internal Revenue, Northern District of California,

Mr. Wood.

Thereupon

1074 E. Frank Campbell

was recalled and testified as follows:

Recross Examination.

Mr. Treadwell. I do not think I care to ask Mr. Campbell anything further. Oh, yes,—there is one question. There was something said, Mr. Campbell, by Mrs. Nickel, in regard to Mr. Miller buying some cattle when he was down to Gilroy on one of those trips; was that while you were present or not,—do you know anything about it?

1075 A. Buying some cattle?

Q. Yes.

A. I think I was there. We rode out in the automobile; they drove some cattle down from the range, and they were purchased; I just know they were brought to Gilroy from the range.

Q. You do not know, though, whose cattle they were?

A. No, I do not know anything about it.

Mr. Treadwell. That is all.

1076

Redirect Examination.

Mr. Sullivan. Mr. Campbell, on these trips to the Cliff House you accompanied Mr. Miller on all occasions?

A. Yes.

Q. And frequently Miss Jensen accompanied him?

A. Yes.

Q. On anyone of these trips did Mr. Miller
1077 have any sinking spells?

A. No.

Q. Not a one?

A. Not that I know of,—any sinking spell.

Q. Did he have any fainting spell?

A. He never had a fainting spell.

Q. Did he become physically weakened so as to become unable to talk to anyone?

A. Not at any time.

Q. Are you sure of that?

A. Positive.

1078 Q. You have given us various form of medication which were administered,—will you let me have them again?

A. About the suppository to induce sleep, and about his sleeping potions,—whatever he had; also his heart stimulant and the nitro-glycerine and the strychnine; and then of course he had different prescriptions prescribed by Dr. Herzstein for indigestion, something like that.

Q. How often did you administer oxygen to
1079 Mr. Miller?

A. At different times.

Q. How often?

A. Possibly when he had a spell I administered oxygen to him.

Q. When did you first commence to administer to him?

A. I commenced the first spell,—when he had the first attack of rheumatic gout.

Q. When was that?

1080 A. That was in October, in the latter part,—commencing in November we administered oxygen.

Mr. Treadwell. 1910?

A. 1910, yes, sir.

Q. Did you have oxygen at the home continuously thereafter?

A. I kept oxygen in the tank at all times.

Q. From October, 1910, to the date of his death you kept a tank of the oxygen?

A. Most generally I had a tank of oxygen in the house.

1081 Q. How frequently would you administer it?

A. We would go on for months and never administer it at all. For a spell I don't suppose he ever used any oxygen whatsoever.

Q. When would you place that year?

A. I suppose it was after he recuperated,—after that attack of rheumatic gout.

Q. That would be in February, 1911?

A. Yes, February, 1911.

Q. So approximately, from February, 1911, to
1082 February, 1912, you did not administer oxygen at all?

A. I don't think I did.

Q. How often thereafter did you administer it?

A. Well, I could not say. Possibly he might have an attack, I probably would give him a little for his respiration; probably he would have a cold or something like that, it would affect his bronchial tubes; they became affected. He was threatened two or three times with pneu-
1083 monia. In order to relieve his respiration I would administer oxygen.

Q. What did you mean by the word attack?

A. Well, he would have a spell; probably due from his gouty condition or indigestion,—that would make him weak and bring up the pulse,—his breathing would be impaired and I would administer oxygen for that; that is what I call attacks; they would be due also from his liver.

Q. As I understand the testimony of Mrs. Nickel,—and if I am in error I want to be cor-

1084 rected,—she testified that Mr. Miller had not very strong kidneys and he could not stand excitement because of that condition.

A. He became quite nervous, and would have a nervous spell and would pass urine very frequently,—sometimes every twenty minutes to half an hour; probably he would do that for three or four hours, and then it would pass off.

Q. That occurred how often?

A. Not very often,—about two or three
1085 months would pass and he would not have a spell at all.

Q. That is, there would be a cessation of two or three months?

A. Yes; they would come on like that.

Q. And what period of time would elapse between the cessation and another cessation?

A. I could not say; it might go on for two or three months and he would not have that at all.

1086 Q. You mean to say that that was a permanant condition but that there would be a cessation of two or three months when he would not be so afflicted?

A. Yes; he would pass his urine ordinarily at stated times,—when he felt so disposed then he did; if he was a little nervous then of course he passed it more frequently; his bladder became weakened and he could not hold it longer.

Q. Did you, when you went out to the ocean beach, did you take oxygen with you?

1087 A. Never.

Q. Did you at any time?

A. Never.

Q. You never administered oxygen at the ocean beach?

A. Never.

Q. Did you ever carry oxygen?

A. Never.

Q. In the limousine?

A. Never. Oxygen was carried in the limou-
1088 sine from Lengeld's drug store to the house when we could not get it quick, but it was never in the machine when Mr. Miller and myself were in it; was a matter of convenience, that is all.

Q. Was Mr. Miller afflicted with bronchitis?

A. He had attacks of bronchitis,—yes, sir.

Q. Mr. Miller's method of speech,—that is, his tone,—was it low or normal or weak?

A. It was loud.

Q. A loud tone of voice?

A. Loud.

1089 Q. Constantly?

A. Yes,—practically.

Q. You are positive of that?

A. I think I am,—yes.

Q. You think you are?

A. In fact, if I remember his speech was not low at all.

Q. It would not be,—a person to talk to Mr. Miller would not have to get close to him,—is that the situation?

1090 A. I never knew anybody had to.

Q. It would not be necessary for a person speaking to Mr. Miller to get very close to him?

A. No.

Q. You are positive of that?

A. Yes.

Q. And a person during these trips to the ocean beach could speak to Mr. Miller without having to get inside the automobile?

A. I would not say that because Mr. Miller's
1091 hearing was slightly deaf at times.

Q. But he was a person of normal hearing himself?

A. You could hear him.

Q. Quite distinctly, without getting in the automobile?

A. Yes, sir.

Q. You are positive of that?

A. Yes, sir.

Q. Have you discussed your testimony with
1092 anybody at all?

A. I have not.

Q. With Mr. Levi,—Mr. Henry Levi?

A. I have not.

Q. Have you been at Mr. Henry Levi's place of business at all?

A. I do not know a Mr. Henry Levi at all.

Q. Do you know the firm of Levi, Schweitzer & Co.?

A. I do.

Q. Where is their place of business?

1093 A. On Fifth Street.

Q. When was the last time you were at Schweitzer Levi Co.?

A. I think it was last Saturday, I think; I think it was last Saturday.

Q. Yes; what was the occasion of your visit there?

A. I went to get sweetbreads there.

Q. How long did you stay there?

A. I was there an hour waiting for them to
1094 arrive.

Q. What did you discuss?

A. He asked me about Mr. Miller,—generally discussed him and what a wonderful man he was.

Q. You did not discuss your testimony with Mr. Levi at that time?

A. I did not.

Q. Did you discuss your testimony with a living soul before taking the stand here?

A. I did not.

1095 Q. Coming now to April 17, 1913, the date of the execution of this will and deed—as I understand it, Mr. Mason first arrived at the house?

A. Yes, sir.

Q. Where was Mr. Miller at that time?

A. I think Mr. Miller was in the sitting room, as far as I can remember.

Q. Which sitting room?

A. Upstairs.

Q. His own?

A. His own,—yes.

1096 Q. Who announced Mr. Mason's arrival?

A. I do not know whether—I would not be positive whether the maid or Mrs. Nickel came and said "Mr. Mason is here".

Q. What happened then?

A. I don't remember now. I announced to Mr. Miller that "Mr. Mason is here", as far as I recollect now.

Q. Mr. Mason came in, did he?

A. Yes.

1097 Q. Did you see Mr. Mason?

A. I did.

Q. Did he have any papers in his hand?

A. He may have had an envelope, as far as I can remember.

Q. Do you know whether he did or not?

A. I do not.

Q. Mr. Mason came in then, did he?

A. Yes.

Q. To see Mr. Miller?

1098 A. Yes.

Q. Did you stay in the room?

A. I did not.

Q. What time of day was it?

A. I know it was in the morning; I think probably around eleven o'clock.

Q. Did anybody come with Mr. Mason?

A. Nobody came into the room.

Q. You did not see anybody?

A. No.

Q. Mr. Mason came alone then?

1099 A. Yes, he did.

Q. And you retired from the room?

A. Yes.

Q. When did you re-enter the room again?

A. I think Mrs. Nickel called me and said Mr. Mason or Mr. Miller wanted to see me in the sitting room.

Q. How long afterwards?

A. It may have been five to ten minutes.

Q. Can you place the longest time that
1100 elapsed?

A. What?

Q. It was not over ten minutes?

A. No, sir.

Q. That would be the longest time from the arrival of Mr. Mason until they called you?

A. Yes, sir.

Q. What room did you enter?

A. From the hall into the sitting room.

Q. Mr. Miller's private sitting room?

1101 A. Yes.

Q. On your arrival in the room who did you find there?

A. Mr. Miller and Mr. Mason.

Q. Mr. Miller and Mr. Mason?

A. Yes.

Q. Anybody else?

A. No, sir.

Q. Nobody else?

A. No, sir.

Q. Mrs. Nickel was there?

1102 A. Mrs. Nickel was not there.

Q. Mr. Nickel?

A. Mr. Nickel was not in the house. He always left at half past eight in the morning and never returned until evening, until after six generally.

Q. When you arrived there you found Mr. Miller, Mr. Mason and who else?

A. Nobody else in the sitting room.

Q. So there were just the three of you in the

1103 room at the time?

A. That I remember, yes.

Q. Now, what happened then?

A. I was asked to sign the will of Mr. Miller, and Mr. Mason said Mr. Miller wished me to sign the will and he handed it to me then and I signed the will.

Q. Where was Henry Miller at that time?

A. Henry Miller was sitting in his chair.

Q. Sitting in his chair?

1104 A. Yes.

Q. Had any table been put before him?

A. Yes, sir. The little table called the breakfast table,—an adjustable table, placed in front of him.

Q. Did you see him sign?

A. I did.

Q. You did?

A. I did see him.

Q. Did they read anything when you got in there,—in the room?

1105 A. Not that I remember.

Q. Were they writing on any papers when you came in there?

A. No.

Q. They were not?

A. No.

Q. You would remember if they were?

A. Yes, I know I would.

Q. You signed your name, then?

A. I did.

1106 Q. Did Mr. Miller sign before you signed?

A. Mr. Miller,—while I was there?

Q. While you were in the room?

A. Yes, sir.

Q. Then you signed?

A. Yes, sir.

Q. Did anything else happen?

A. I think they called for Miss Jensea, if I am not mistaken.

Q. Did Mr. Mason sign it?

1107 A. I do not remember that now myself.

Q. How many papers did you sign?

A. I think I only signed one paper, as far as anything I know.

Q. Would you not know how many papers you signed?

A. I only remember signing my signature once.

Q. You were not in the habit of signing papers promiscuously there, were you?

A. I was not.

1108 Q. They told you this was Mr. Miller's will, did they?

A. They did.

Q. And didn't you think it rather important to remember an event of that character at that time?

A. I did not.

Q. You did not?

A. I did not.

Q. Then what happened?

1109 A. I think Miss Jensea was called into the room also to sign the will.

Q. And she signed it?

A. Yes, sir.

Q. Then what happened?

A. I know I withdrew, I think both of us came out at that time.

Q. Did Mr. Mason come out with you?

A. He did not.

Q. How long did he stay in the room?

1110 A. I could not say,—I think Mr. Mason came through the hall, as I remember now.

Q. Did you see Mr. Mason come through the hall?

A. Yes, I did.

Q. How long afterwards?

A. It might have been ten minutes.

Q. Did he have any documents with him?

A. I do not remember, to tell the truth.

Q. You do not remember?

A. No, sir.

1111 Q. Did you sign any other papers as a witness?

A. That day?

Q. At any time.

A. Yes, I remember these other two papers, which were shown to me by Mr. Treadwell.

Q. When did you sign them?

A. I do not remember whether they were signed at the same time.

Q. Do you remember the occasion of signing
1112 them?

A. I know I was asked to come and sign some papers, I know that fact,—by Mr. Treadwell.

Q. Where was that?

A. I do not remember whether that was in the sitting room or whether that was in the front room, the bedroom,—I could not say.

Q. Do you remember the time of day?

A. I think it was in the morning. No business was transacted in the afternoon. Most
1113 generally he went out or laid down and took a sleep.

Q. In speaking of the occasion when you two other papers were signed——

A. Yes.

Q. Where was Mr. Miller that morning?

A. I think he was in the sitting room,—it might have been the front bedroom.

Q. What do you mean by the front bedroom?

A. Mrs. Nickel's, which connected with his bedroom, through a little hallway,—sometimes he sat in front there.

1114 Q. Who came there to the house,—if anybody?

A. Nobody that I know of.

Q. Nobody came to the house?

A. Nobody outside of Mr. Mason and Mr. Treadwell that I know of.

Q. Well, Mr. Mason and Mr. Treadwell of course did not live there?

A. They did not.

Q. So they must have come some time?

1115 A. I said nobody outside of them.

Q. When did they come there?

A. Most generally in the morning.

Q. I am speaking of this occasion when the two papers were signed,—you remember that occasion?

A. They were not signed on the same day.

Q. You do not think so?

A. I don't remember it.

Q. Do you remember the occasion, though,

1116 when the papers were signed?

A. I remember that.

Q. When Mr. Treadwell and Mr. Mason were there?

A. Yes, I do.

Q. Who came there first, or did they come together?

A. They did not come together,—no, sir, I remember. I do not remember whether Mr. Treadwell or Mr. Mason was announced first, I could not say.

Q. You do not know?

1117 A. No, sir; I do not remember that.

Q. Who brought the papers there?

A. I could not say.

Q. Well, how long a time elapsed from the introduction of either Mr. Treadwell or Mr. Mason until the papers were signed?

A. Maybe fifteen or twenty minutes,—it might not have been so long.

Q. Could you give us an outside figure, in minutes?

1118 A. Well, I say it might have been fifteen or twenty minutes.

Q. Twenty minutes would be your estimate?

A. Yes.

Q. That is, from the time the first one came until the papers were actually signed?

A. Yes, sir.

Q. Where was Mr. Miller at the time?

A. I do not remember now whether he was in the front room or whether in the sitting room

1119 now or not.

Q. Was he in bed?

A. No, sir.

Q. Was he sitting in a chair?

A. Sitting in a chair; he was always up.

Q. All right. Were you in the room during the discussion of any of the business?

A. No, sir.

Q. How did you happen to come in the room?

A. I was called.

Q. Who called you?

1120 A. I think Mr. Treadwell came and called me if I remember rightly.

Q. When you went in the room who did you find there?

A. Mr. Miller, Mr. Treadwell, Mr. Mason—that is all.

Q. Nobody else?

A. No, sir.

Q Did you see him reading any papers when you got there?

1121 A. I do not remember.

Q. You do not remember?

A. I remember the papers were on the table, as near as I remember now.

Q. Had Mr. Miller signed them?

A. That I do not remember,

Q. You signed the papers?

A. I signed the papers; yes, sir.

Q. How long did you stay in the room?

A. I withdrew immediately after I signed.

1122 Q. Did Mr. Mason and Mr. Treadwell remain there?

A. That I could not say; I do not remember that.

Q. You do not remember that?

A. I do not remember that.

Q. Did they tell you what kind of papers they were?

A. I do not think they did; I do not remember that, either.

Q. How many papers did you sign?

1123 A. As far as I can remember now, I think there were two; and the previous one.

Q. Three papers?

A. Yes, sir.

Mr. TREADWELL. Three altogether,—three different times?

A. No, two at one time.

Q. No, two at one time?

A. No, sir.

Q. On this occasion you signed one paper, is
1124 that the idea?

A. Yes, sir.

Q. Did you sign any other papers then?

A. I did not; not that I can recollect.

Q. And you cannot tell us how long afterwards Mr. Treadwell stayed there?

A. I could not; within a few minutes probably because seldom at any time after business was finished like that,—most generally he went away immediately.

1125 Q. Did you know what happened to the papers?

A. I did not.

Q. Were they there after Mr. Treadwell left?

A. I did not see them.

Q. You did not see them?

A. No.

Q. You would have noticed them?

A. I probably came back to Mr. Miller and probably put the table away,—he wanted a drink or something like that, wanted to go to the toilet.

1126 Q. You would have noticed as important a paper as a will?

A. Yes, sir.

Q. You did not see it there?

A. No, sir.

Q. Before any of these papers were signed, did you see it around the house?

A. I did not.

Q. You would have noticed it?

A. Probably I would if they had been on the

1127 table there.

Q. If they were in Mr. Miller's quarters you would have known?

A. I probably knew.

Q. You probably knew?

A. I would have.

Q. But before the execution of these papers you had not seen them around Mr. Miller's rooms?

A. No.

1128 Q. At no time?

A. No.

Q. Subsequent to the execution did you see them around the room?

A. I did not.

Q. And you would have noticed it?

A. Yes, sir.

Q. Before these papers were signed did you see Mr. Miller reading them?

A. I did not.

Q. And if Mr. Miller had been reading those papers you would have noticed it, of course?

1129 A. Yes, sir; I would have; I probably would.

Q. You probably would?

A. I would have noticed it.

Q. You did not see him reading it at any time before any of these occasions?

A. Yes, sir.

Q. And you were the day nurse, in charge constantly?

A. Yes, sir.

Q. Now, did Mr. Miller ever discuss with you
1130 the reason why he signed any of these papers?

A. He never did.

Q. Did he tell you before they were signed that he was going to have some papers signed?

A. I think he may have mentioned that there was somebody coming out,—I probably knew that Mr. Treadwell was coming,—he probably said Mr. Treadwell is coming up this morning, —that he wanted to see Mr. Treadwell,—something like that; he never discussed any of his
1131 business at any time.

Q. He never discussed with you any reason for signing these papers?

A. No, sir.

Q. At any time?

A. At any time.

Q. Did he ever discuss with you anything about the disposition of his property?

A. Never.

Q. Mr. Miller was troubled, during the time you were with him, with his liver, his stomach,

1132 his heart, his kidneys, his lungs, his respiration, circulation, general weakened condition, rheumatism, gout?

A. Yes, sir.

Q. And similar matters?

A. Yes, sir.

Q. And each and all of these matters were the occasion of your constant attendance on him, Mr. Lane's attendance on him as night nurse, and the daily visits of Dr. Herzstein save for the

1133 time when you were absent from San Francisco with Mr. Miller?

A. Yes, sir.

Q. These general disorders are what you have embraced under the term "rheumatism" and "gout" throughout your testimony?

A. Yes, sir.

Q. That is all, Mr. Campbell.

Re-cross Examination.

1134 Mr. TREADWELL. I think you have said, Mr. Campbell, that you knew Mr. Treadwell,—myself?

A. Yes, sir.

Q. And you remember me coming to the house on several occasions?

A. Yes, sir.

Q. Do you?

A. Yes, sir.

Q. You have a distinct recollection now on how many occasions I came there?

1135 A. No, I do not remember now. Either you were announced by the maid down stairs, or announced by Mrs. Nickel that Mr. Treadwell was here to see Mr. Miller.

Q. At any rate, on a different number of times you saw me there?

A. Yes, sir.

Q. By the way, how late do you remember seeing me come to consult with Mr. Miller?

A. I remember now exactly, less than a year.

1136 Q. Certainly within a year?

A. Less than that time.

Q. And you do remember an occasion when a will was executed and when Mr. James Mason was present and I was present?

A. I do.

Q. You remember that thoroughly?

A. I do.

Q. And you were asked to come in and witness this execution, were you not, Mr. Camp-

1137 bell?

A. I was.

Q. You think,—that is your recollection?

A. I think so.

Q. At any rate someone asked you?

A. Someone asked me to come and sign the will of Mr. Miller.

Q. Did you find the table that was there for the purpose of Mr. Miller signing the instrument as you came in?

A. Something like that,—I think that Mr. Miller said, "Fix the table."

1138 Q. You had done that same thing before, had you?

A. A number of times when he wanted to write.

Q. Did you find the table in front of Mr. Miller?

A. In front of Mr. Miller,—he probably asked me for the pen and ink,—sometimes he asked me to place the table in front of him—he wanted to write.

1139 Q. Did you see him sign the will at that time?

A. I did.

Q. Did he tell you what it was?

A. He said, "This is my will; I would like you to sign it, Mr. Campbell, if you will."

Q. You did sign it, then?

A. I did.

Q. You saw Mr. Mason sign it?

A. I guess I did.

1140 Q. Did you see me sign it as a witness at that time?

A. I suppose I did; I really do not remember; I expect I did.

Q. Now, I showed you the other day, and I show you again, so as to get them into the record, Mr. Campbell, a photographic copy of the last page of Mr. Miller's will, dated the 17th day of April, 1913, and signed Henry Miller.

A. Yes, sir.

Q. You know Mr. Miller's signature, do you?

A. Indeed I do.

1141 Q. That is his signature?

A. Positively.

Q. I also show you the next page which reads as follows: "The foregoing instrument consisting of twenty typewritten pages exclusive of this page and typewritten on one side of the page only was on the day last above written by said testator signed, sealed, published and declared to be his last will and testament in the presence of us, who in his presence and at his
1142 request have hereunto subscribed our names as witnesses thereto. James Mason, San Francisco, California, E. Frank Campbell, San Francisco, California, Edward F. Treadwell, San Francisco, California." Do you recognize your signature on that?

A. I certainly do.

Q. And you did sign it?

A. Certainly.

Q. And you say Mr. Miller also signed the
1143 will at that time in your presence?

A. He did.

Q. And now, what is your recollection as to Mr. Mason and Mr. Treadwell,—Mr. Mason signed there at the same time?

A. He must have signed it; I was present.

Q. You knew you were there for the purpose of witnessing the execution of this will?

A. I was told so.

Q. You read the statement there that it was,—never mind that. Now, the only thing that took place while you were in the room was

1144 simply the execution of this will by Mr. Miller and the subscribing witnesses?

A. That was all.

Q. And you knew that it was Mr. Miller's will?

A. Yes.

Q. You had nothing to do with the execution of the deed of trust?

A. Nothing.

Mr. TREADWELL. I would ask to have this
1145 photographic copy of the last page of the will, page 20, and the witnessing clause, page 21, identified as part of the testimony of the witness.

REFEREE. Respondent's Exhibit No.

Mr. PEART. Who took the photograph?

Mr. TREADWELL. It was taken by Crosset & O'Farrell, in the Hobart Building,—taken in my presence. I ask that it be attached to the testimony.

1146 Mr. TREADWELL. Q. You say you also remember another time when you witnessed another instrument for Mr. Miller?

A. Yes, I do.

Q. And I show you now a photographic copy of what purports to be a codicil to the last will and testament of Henry Miller, dated the 14th day of June, 1913, and I would ask you if that is your signature attached to that?

A. It certainly is.

Q. And that is also the signature of Miss Jensea?

1147 A. It is.

Q. Now, did you both sign at the same time?

A. Yes.

Q. You were both present?

A. Yes.

Q. Did you see Mr. Miller sign it?

A. Yes; I did.

Q. Did he tell you what it was?

A. He did.

Q. What did he tell you it was?

1148 A. He said it was the codicil,—that Mr. Frank Anderson would be unable to serve and this was a codicil.

Q. Now, have you any definite recollection as to who brought that paper to the house?

A. I do not know; no, sir, I would not know who brought it.

Q. You did not mean by your testimony that Mr. Mason brought this instrument?

1149 A. No, sir.

Q. Do you remember Mr. Mason being there more than once, Mr. Campbell, on other matters entirely disconnected with this?

A. I do not remember; Mr. Mason called only in reference to this.

Q. Just the one time when the will was executed?

A. Yes, sir.

Q. Do you know Mr. Mason when you see him?

1150 A. I would know him by his white hair; I never saw him before. I remember his white hair and I know his name was Mason.

Mr. Treadwell. I will ask to have the instrument identified as part of the examination of Mr. Campbell.

Referee. Respondents Exhibit No.

Q. Now, as I understand it, outside of Mr. Miller telling you that one of these instruments was his will and the other a codicil to his will,
1151 and that the codicil was made because Mr. Anderson was unable to act, you had no information as to the purpose or reason for the execution of these instruments?

A. No; Mr. Miller never discussed any of his affairs.

Q. And the same is true of the deed of trust?

A. I never saw the deed of trust; I was never called for that.

Q. You had nothing to do with the deed of
1152 trust?

A. Not to my knowledge.

Q. You had no discussion with Mr. Miller, Mr. Nickel or Mrs. Nickel?

A. They never discussed their business with me; I was simply the nurse in the case.

Q. You never heard them say what the purpose was?

A. No.

Q. Where was this oxygen kept?

A. It was generally kept in my bed room.

1153 Q. Was it any place where Mr. Nickel would be likely to see it and know it was there?

A. Mr. Nickel? No, I don't think he ever came in my bed room at all. Most generally he came to Mr. Miller's bed room door or rapped on the door and he might knock on my door. Sometimes he would rap on my door, asking whether Mr. Miller could be seen or not,—whether Mr. Miller was in his bed room.

Q. Do you know what Mr. Miller died of, Mr.
1154 Campbell?

A. No, I do not,—so far as I know it was general breakdown.

Q. Now, just a moment,—what you know is what I want,—at any rate, you do not know?

A. I do not.

Q. And at the time you left there, which was how far along before his death?

A. A little over three weeks.

Q. And at that time he did not have pneu-
1155 monia?

A. No, sir; he did not.

Q. So if he died of pneumonia between the time you left and the date of his death, as far as you could see at that time it would be nothing but old age?

A. No, sir.

Q. When you left there was no indication of death?

A. Not at all; he was up every day, and walking to his sitting room, to and fro.

Q. That is all, Mr. Campbell.

1156 Re-direct Examination.

Mr. SULLIVAN. What magazines did Mr. Miller read?

A. Why, he read the Argonaut.

Q. The Argonaut. Did he ever read an eastern magazine known as the "Outlook"?

A. No, I do not remember of his reading that; he might have picked it up, if it was put on his table, but I do not remember his reading the "Outlook" at any time.

1157 Q. You know there is such a magazine as the Outlook?

A. Yes, sir; I do.

Q. On these trips to the ocean beach how would Mr. Miller be dressed?

A. He always dressed the same; always had a checked suit, sort of gray, he never allowed colors at all; sort of checked suit,—he had two or three suits about the same kind, most generally that and overcoat,—always had a black

1158 overcoat and black hat,—he did not wear his skull cap; invariably a checked suit and black overcoat and carried a cane.

Q. Did you ever prop him up with pillows while in the machine?

A. Yes, in order to get him a brace,—put pillows at his back and feet.

Q. Did you put any covering around his legs?

A. Always put a robe about him; we always took a fur robe along.

Q. That is all.

1159 At this time (12:05) the hearing adjourned to 2 P. M., when Mr. Mason and Mr. David Brown are to be called as witnesses.

Tuesday, November 28, 1916

2 P. M.

The hearing adjourned to 2 P. M. proceeded, and the State of California thereupon called

1160 JAMES MASON,

who being sworn, testified as follows:

Mr. PEART. Your name is James W. Mason?

A. No, sir; James Mason.

Q. And you reside at San Francisco, Mr. Mason?

A. I do.

Q. And you have been a notary public for many years?

1161 A. Nearly forty years.

Q. And you are now a notary public?

A. Yes, sir.

Q. And were in April and in June, 1913?

A. Yes, sir.

Q. Do you recall the occasion of going to Mr. Henry Miller's residence in Laguna street in April, 1913?

A. I do.

Q. At whose request did you go out there?

A. Mr. Treadwell.

1162 Q. Did you receive that request on the day that you went out there?

A. Yes, sir.

Q. How did it come,—by telephone?

A. No, I think Mr. Treadwell came over to the office and said he wanted me to go out with him.

Q. Your office was where at that date?

A. No. 430 California street.

Q. What did Mr. Treadwell say at that time?

1163 A. My recollection is that he said he wished me to go out to Mr. Miller's house to attend to some business.

Q. And you went out there with Mr. Treadwell,—to the house?

A. Yes, sir.

Q. About what time of day was it?

A. My recollection is that was in the forenoon, probably about 11 o'clock.

Q. Was anybody else with you besides Mr. Treadwell?

1164 A. No, we went out together in the machine. I do not think there was anybody with us.

Q. When you went into the house where were you shown,—what part of the house,—do you remember?

A. Well, I think it was a room on the main floor, the ground floor, to the left of the hall.

Q. And who was there in the room, Mr. Mason, besides Mr. Treadwell and yourself?

A. I believe Mr. Campbell, the nurse, was there when we went into the room.

1165 Q. And Mr. Miller?

A. And Mr. Miller.

Q. Was Mr. Miller in bed or in a chair?

A. He was sitting in a chair, fully dressed.

Q. A reclining chair, one of these invalid chairs,—or an ordinary chair?

A. Well, I am not sure it was not a reclining chair; no, he was sitting up.

Q. An easy chair, or an ordinary dining room chair,—do you remember?

1166 A. It did not impress me; an ordinary chair, he was sitting upright in it.

Q. Was anybody else in the room besides Mr. Miller. Mr. Treadwell, Mr. Campbell and yourself?

A. I believe Mrs. Nickel was in the room at different times,—in and out of the room.

Q. Just what was done at that time?

A. Well, I think the first thing we did was Mr. Miller executed his will in the presence of
1167 Mr. Treadwell and Mr. Campbell and myself, and made the declaration of his will, and requested us to sign as witnesses, which we did, in his presence and in the presence of each other.

Q. Did Mr. Miller have the document with him when you went in there?

A. That did not impress me at the time; it is possible Mr. Treadwell took it out with him; I don't remember.

Q. You do not recall. Was that the only document executed at the time?

1168 A. Well, after we got through with the will, I think that the deed of trust was executed.

Q. Did the witnesses to the will remain while the deed of trust was being executed?

A. While Mr. Miller executed it, yes,—the deed of trust, yes.

Q. What was the order of signing as witnesses to the will,—do you recall?

Mr. Treadwell. The instrument would be the best evidence.

1169 A. I do not know whether Mr. Treadwell signed first or I signed first.

Q. This photographic copy of the attestation clause of the will has been identified in another deposition. And you will see that the names of the witnesses appear there,—first, your own, second, Mr. Campbell's name, third, Mr. Treadwell's,—were they signed in that order?

A. They were; yes.

Q. Did the signing by the witnesses follow-
1170 ing immediately upon the signature of the will by Mr. Miller?

A. Yes.

Q. That is Mr. Miller's signature, is it, as shown by that photographic copy of the last page of the will?

A. It is.

Q. Are you familiar with his signature, Mr. Mason?

A. Well, I have seen it a good many times, of course.

1171 Q. You have taken other acknowledgments for Mr. Miller's signature in previous years?

A. Oh, yes, yes.

Q. How long a time would you say intervened from the time of the signing of Mr. Treadwell's name as a witness to the will before the execution of the trust deed by Mr. Miller?

A. I do not think any time of importance elapsed at all. It was done immediately afterwards.

1172 Q. And did Mr. Miller make any statement at all to the witnesses assembled there in the room in reference to either the will or the trust deed, except the request to the witnesses to witness the will?

A. Well, the declaration that it was his will, of course, and then he acknowledged to me the deed of trust.

Q. You asked him the customary question, Mr. Mason, did you,—do you acknowledge your
1173 signature to this document and he gave assent in some way?

A. He either said "yes," or said it was.

Q. Did he make any other comment on the deed of trust?

A. Not to my knowledge.

Q. Did he say anything else except what you have given us in substance?

A. Not as I remember it.

Q. How long would you say you were in the room with Mr. Miller and the witnesses from the time you first went into until you left?

1174 A. Well, I should say not more than ten minutes; that is guess work.

Q. You said Mrs. Nickel, according to your recollection, was in and out of the room,—how many times do you recall?

A. No, I think it was just lying around. I could not give any particular time,—she seemed to be in attendance upon her father.

Q. Did anyone read any one of the documents, or any part of the documents, to Mr. Miller, in
1175 your presence?

A. No, sir.

Q. Did Mr. Miller himself read any portion of it?

A. Not while I was there.

Q. Do you recall that definitely?

A. Oh, I do not think he did anything except execute the documents and do what was necessary in that regard. He seemed to be prepared for us when we went in there, and there
1176 was nothing to be said or done as far as I know.

Q. But you do not recall just where either the will or the deed of trust which Mr. Miller signed came from,—whether he had them or Mr. Treadwell produced them?

A. No, I do not remember that.

Q. Did you see a copy of either the trust deed or the will at that time?

Mr. Treadwell. You mean more than the original?

Q. Yes,—exclusive of the two originals executed by him.

1177 A. Well, I do not know. I think I have a hazy recollection, but I cannot say why I think so, but I have a sort of a faint recollection that Mr. Miller had a copy of the document there when we went in, but I am not sure.

Q. Of both the documents?

A. I do not know. I did not look at the documents; I could not say about that.

Q. Is your recollection very clear upon the point that Mr. Miller first executed the will and
1178 then the trust deed?

A. Yes, I am pretty sure about that.

Q. Was there any conversation between any of the witnesses or persons present in the room that you recall?

A. I do not remember any conversation except what was actually necessary in executing the document.

Q. In other words, Mr. Treadwell did not say anything that you can recall?

1179 A. Mr. Treadwell did whatever talking was necessary to Mr. Miller in talking about the will, and I did the conversing in regard to the deed of trust.

Q. Did Mr. Treadwell, do you recall instruct Mr. Miller that it was necessary for Mr. Miller to request the witnesses to sign the will,—to witness the will?

A. I don't remember just the words used,—Mr. Treadwell said to Mr. Miller, "do you declare this to be your will and do you request us

1180 to this this as witnesses?" Just the proforma way of doing things.

Q. Did Mr. Treadwell, do you recall, give any instructions to Mr. Miller in regard to the execution of the trust deed?

A. I do not think so.

Q. Did Mr. Miller at that time make any statement at all as to his reasons for executing either the will or the trust deed?

A. Not in my presence,—no.

1181 Q. Did he make any statement at all as to his purposes in disposing, or intentions as to disposing, of his property?

A. Not in my presence,—no.

Q. When had you seen Mr. Miller before this occasion, Mr. Mason?

A. Well, I don't remember. I have been to his house several times. My mind is too vague on that subject to say when because I did not pay particular attention. I had been there two

1182 or three times, but before or after I could not say.

Q. How long have you known Mr. Miller?

A. I have known him as Henry Miller for a great many years, but did not know him much until the last few years since I have been doing the business of Miller & Lux.

Q. Did you ever have any talk with Mr. Miller at all about his disposition of his property?

A. Never had any, except formal conversation,—acknowledgments of his instruments. I do

1183 not know that I ever conversed with him at all except in that way.

Q. Did you see any other documents of any kind there at the time the will and the trust deed were executed?

A. As I say, I have a vague recollection that I saw a document which at the time I might have thought was a copy, but I cannot say positively; I did not look at the documents and I do not know.

1184 Q. Do you remember seeing any stock certificates there at all?

A. They were not exhibited while I was there. Mr. Treadwell had a package in his hand, which looked like a stock certificate book, but it was not opened up while I was there.

Q. Did you leave the house alone or did Mr. Treadwell leave with you?

A. I went alone.

Q. You went down town in the street car?

1185 A. I did that or walked. I rode in a street car.

Q. What happened to the will the last you saw of it?

A. I retired after I executed the deed of trust with Mrs. Nickel, and I did not see it any more.

Q. Now, you took Mrs. Nickel's acknowledgment to her signature to the deed of trust, did you, Mr. Mason?

A. Yes.

1186 Q. When and where was that taken?

A. I think after we got through with Mr. Miller we went to another room where Mrs. Nickel executed that document. I do not know whether we went up stairs or to another room on the same floor.

Q. And what happened then?

A. After I got through taking her acknowledgment?

Q. No, at the time you were taking it, what
1187 was said and done?

A. Nothing as I remember it, except that Mr. Treadwell indicated where she was to sign and I took the acknowledgment.

Q. There were present Mrs. Nickel, Mr. Treadwell and yourself only?

A. I do not remember whether the nurse went into that room, we were probably alone.

Q. And that was in a room adjoining the room where you had previously been?

1188 A. I think it was in a room on the same floor, but we might have gone up stairs to another room.

Q. The conversation was simply confined to an indication where to sign by Mr. Treadwell, and the formal words of taking an acknowledgment, on your part, of Mrs. Nickel?

A. Yes.

Q. Nothing was said about the document at all?

A. Not in my presence.

1189 Q. And the last you saw of the deed of trust was what,—who had it?

A. I took it with me.

Q. You took it with you when you left the house?

A. Yes.

Q. Where did you go with it, Mr. Mason?

A. I first went to my office to see if I was needed there; then I went over to Miller & Lux's office and saw Mr. Nickel, and he executed the
1190 deed of trust.

Q. Was anything said between you and Mr. Nickel at that time?

A. Only the necessary words in taking the acknowledgment.

Q. He signed the deed of trust in the office of Miller & Lux?

A. Yes.

Q. And that would be about half or three-quarters of an hour after you left the house?
1191

A. Yes, I do not know whether I went right away,—I might have been needed at the office. Something might have turned up during my absence, and then when it was convenient I went over there.

Q. You would say that possibly three-quarters of an hour would be your estimate covering both the acknowledgments of Mr. and Mrs. Nickel?

A. Yes.

1192 Q. And after that was done by you what did you do with the deed of trust?

A. I delivered that to Mr. Treadwell's office, either to Mr. K—— or his clerk. I do not remember whether Mr. Treadwell was there.

Q. You returned the papers to Mr. Treadwell?

A. I think I took the paper back,—that is my recollection, but who I handed it to I do not remember.

1193 Q. That was around the noon hour of that day?

A. I think so; it was all done in the forenoon.

Q. Before you left the Nickel residence to obtain Mr. Nickel's signature and acknowledgment to the deed of trust, did Mr. Treadwell request you to have Mr. Nickel acknowledge it and then bring it to his office?

A. I do not know what he instructed me to
1194 do. Mr. Nickel had to execute it, and it was up to me to see that it was done.

Q. Nothing was said by Mr. Nickel as to the reasons or purposes which this acceptance was made by him as a trustee?

A. No.

Q. Nothing except the mere formal words required for him to sign and acknowledge the instrument?

A. Yes, sir.

1195 Q. Are you positive, Mr. Mason, that the papers were executed on the first floor,—may it not have been on the second floor?

A. My recollection is that it was all done on the main floor, but I would not be sure.

Mr. Peart. I think that is all, Mr. Treadwell.

Cross-Examination.

Mr. Treadwell. Q. Do you remember which way you turned when you went into the house,
1196 Mr. Mason, to go to the floor where the papers were executed,—whether you turned to the right or left?

A. My impression is that it was to the left,—I would not be sure about anything.

Q. At any rate——

A. That is my present recollection.

Q. Your present recollection is that it was on the ground floor?

A. Yes.

1197 Q. You may have taken Mrs. Nickel's acknowledgment possibly on the second floor?

A. Yes.

Q. You know it was in a different room?

A. Yes, I know it was wherever she took us.

Q. Now, I showed you what purports to be a photographic copy of the last page of the will of Henry Miller, dated April 17, 1913, being page 20, and also the witnessing page, being page 21, and those are the two papers that you have already identified in your testimony?

1198 A. Yes.

Q. And that signature on page 21 is your signature, is it?

A. Yes, sir.

Q. The signatures of Mr. Campbell and Mr. Trendwell you say were signed at that same time?

A. Yes, sir.

The documents were thereupon identified by the witness as Respondent's Exhibit No. 1.

1199 Q. I also show you the deed of trust in question, dated the 17th day of April, 1913, and call your attention to the acknowledgment, and that, I would ask you if that is your signature to that acknowledgment?

A. Yes, sir.

Q. And that is the acknowledgment you referred to, is it?

A. Yes, sir.

Q. And the signature there of Henry Miller,

1200 was that signed by him at that time?

A. Yes, sir.

Q. And the acknowledgment on the next page, by you, of the signatures of Nellie Miller Nickel and J. Leroy Nickel, is that your acknowledgment?

A. Yes, sir.

Q. And those signatures were signed in your presence, were they?

A. Yes.

Q. And you took those acknowledgments as you certified?

1201 A. Yes, sir.

Mr. Treadwell. I do not want to leave this original deed of trust,—would it be satisfactory for the Referee to mark it as an exhibit and allow us to withdraw it, and leave the printed copy?

Mr. Peart. Yes.

Referee. Respondent's Exhibit No. 2.

Mr. Treadwell. Q. Now, you have already stated, Mr. Campbell and Mr. Treadwell and
1202 yourself were there together and witnessed the will and Mr. Treadwell remained while the deed of trust was being executed also, did he?

A. Yes, sir.

Q. Are you sure whether Mr. Campbell remained while the deed of trust was being executed or not?

A. No, I do not remember whether he accompanied us or not; he was in the house.

Q. Yes; he was not a witness to the deed of
1203 trust, was he?

A. No, I think not. He was in the room when Mr. Miller executed the deed of trust.

Q. That is your recollection,—that he was still there?

A. Yes.

Q. How long have you been attending to the business of Miller & Lux?

A. Well, I have been attending to it now regularly for four or five years,—probably a little longer than that. I first attended to busi-

1204 ness for them for an old colleague, Mr. King, who was sick. He was their notary and when he broke down I attended to business for him, when he was sick.

Q. When was that?

A. Before the fire. He died before the fire and then I continued to do the business for some little time myself; and then Mr. Knox got the business. He attended to it for some years until he died; then Miller & Lux came back to me.

1205 It is probably four or five years now,—I could not say.

Q. At any rate, you have done the business pretty regularly since the fire, have you?

A. Except the time that Mr. Knox broke in and got it away from me.

Q. So you saw more or less of Mr. Miller during that period?

A. Oh, yes; I frequently went to his office to see him.

1206 Q. You had seen him for years?

A. Yes, I had known him for years.

Q. How did he look when you called at the house,—what was his condition?

A. He looked just the same to me as he always had been when I saw him before.

Q. He was sitting up, was he?

A. Just the same position, as when I went to his office. He was sitting down at a desk or table when I went into the room,—in the same position and condition as when I saw him at other times.

1207 Mr. Treadwell. The records show that the Referee has marked the last page of the will dated April 17, 1913, and the attestations as Respondent's Exhibit 1, the codicil dated June 14, 1913, as Respondent's Exhibit 2, and the deed of trust dated April 17, 1913, as Respondent's Exhibit 3.

Mr. Treadwell. That is all.

Re-direct Examination.

Mr. Peart. While you were there on the 17th
1208 day of April, 1913, Mr. Mason, in the residence and in the room with Mr. Miller, did Mr. Miller change his position from the time you went in and the time you went out?

A. I do not think he changed his position. He was sitting in the room,—I think Mr. Campbell, the nurse, might have moved his chair to the table, or brought the table to him.

Q. But he remained seated in the chair at all times?

1209 A. Yes, sir.

Q. Mr. Miller looked about the same to you as he had on previous occasions when you had seen him at his office or about the city? When you saw him at his office or around town he was walking himself, was he not, and unaccompanied by anyone?

A. Well, when I went to his office he was invariably sitting down.

Q. Did you ever see him walking about the streets?

1210 A. Yes, sir; I guess I did. I saw him riding horseback at the Butchers' Parade, and that sort of thing, but I never noticed him walking on the street.

Q. Did Mr. Treadwell say to you when he took you out to the house that morning in the automobile what documents were to be executed there that day?

A. I do not remember that he did.

Q. You were not aware at the time that these
1211 documents were to be executed that Mr. Miller had been under the care of physicians—the daily care of physicians from October, 1910, with nurses in attendance every hour in the twenty-four of the day, were you?

A. I knew he was away from his office, but I did not know anything about his medical attention particularly. I did not know how long he had been away from the office.

Q. Did Mr. Treadwell discuss with you any
1212 reasons at all for the execution of the trust deed in connection with any particular steps you were to take in regard to the acknowledgments?

A. No, sir.

Q. He did not make any statements to you about that at all?

A. Not at all.

Mr. Peart. I think that is all.

Referee. The original trust deed is withdrawn by consent, and copy substituted for use during this hearing.

1213 The next witness called by the State of California was

DAVID BROWN,

who being first sworn, testified as follows:

Mr. PEART. Your name is what, Mr. Brown?

A. David Brown.

Q. And where do you reside?

A. 1024 Grand street, Alameda.

Q. Alameda County, California?

1214 A. Alameda County, California.

Q. And how long have you been in the employ of Miller & Lux?

A. About thirty years.

Q. That is, in the employ of those interests which are now represented by Miller & Lux, Incorporated?

A. Yes.

Q. And what is your present position with Miller & Lux, Incorporated?

1215 A. I am nominally secretary, but my work is nearly all with land matters, taxes, deeds, contracts,—things of that kind.

Q. When were you elected secretary of Miller & Lux, Incorporated?

A. At the time of the incorporation of the company,—1905, I think.

Q. Miller & Lux, Incorporated, is the central holding company, is it, for all of the Miller & Lux properties, so-called?

A. Yes, sir.

1216 Q. And what are the subsidiary corporations, Mr. Brown?

A. Pacific Livestock Company.

Q. And this is a corporation formed under the laws of what state?

A. California.

Q. And what others,—what other subsidiary corporations are there?

A. Entirely owned by Miller & Lux, or that they have shares in only?

1217 Q. Take first those owned entirely by Miller & Lux, if there are any other such.

A. I do not recall any other.

Q. Then give us the other corporations in which Miller & Lux hold a certain number of shares.

A. That I cannot do offhand. The San Joaquin & Kings River Canal & Irrigation Company, Kern Valley Water Company, South San Francisco Land & Improvement Company, Antelope Land & Cattle Company, West San Joa-

1218 quin Valley Company,—that I think they own all the shares,—it is a small water company.

Q. Can you think of any others?

A. I do not think of any. There are others, trifling little things, I cannot recall all at present. State fairs and things of that kind; they do not amount to anything.

Q. Does the corporation of Miller & Lux, Incorporated, own any bonds of any other corporations?

1219 A. They own banks,—the Bank of Los Banos, for instance, all of the stock I think; and the Bank of Gustine, and the Bank of Dos Palos.

Mr. Treadwell. That is just a branch.

A. A branch of the Bank of Los Banos.

Q. Does the corporation of Miller & Lux, Incorporated, own bonds in any other corporation,—public or private?

A. No, except some of these banks do, I believe.

1220 Q. Well, that would come under the head of assets of subsidiary corporations?

A. Yes.

Q. If I understand your reply correctly, the corporation Miller & Lux, Incorporated, owns all of the stock of the Pacific Livestock Company, all of the stock of the West San Joaquin Valley Water Company, and all of the stock of the Bank of Los Banos?

A. That is my recollection.

1221 Q. And there are no other corporations of which it is the sole owner of stock?

A. I do not recall any.

Q. And it owns stock interests in the San Joaquin & Kings River Canal & Irrigation Company, the Kern Valley Water Company, the South San Francisco Land & Improvement Company, the Antelope Valley Land & Cattle Company?

A. And the Bank of California.

1222 Q. Mr. Brown, in how many of these companies in which Miller & Lux does not own all of the stock does it own a holding interest?

A. San Joaquin Kings River Canal & Irrigation Company; Kern Valley Water Company.

Q. Those two only?

A. Those two are all I can recall at present. The Bank of Gustine and Bank of Los Banos.

Q. Does it own all of the stock of the Bank of Gustine or merely a controlling interest?

1223 A. Certainly a controlling interest,—that is all I can say without looking it up.

Q. Then Miller & Lux, Incorporated, is a minority stockholder in the South San Francisco Land & Improvement Co., the Antelope Valley Land & Cattle Company, and the Bank of California?

A. Yes.

Q. Previous to the incorporation of Miller & Lux, Incorporated, which is a corporation or-

1224 ganized nuder the laws of Nevada, there was a corporation called Miller & Lux?

A. Oh, yes.

Q. Under the laws of what state was that corporation organized?

A. California.

Q. What was the date of the dissolution of that corporation? If you cannot give it accurately, just approximately, Mr. Brown.

A. Went out by failure to pay license tax, if I remember rightly. About 1905,—some time before the incorporation of the successor.

1225 Q. How long had that corporation been in existence, prior to 1905?

A. 1897, I think.

Q. Was it from 1897 until 1905 the holding company for the Miller & Lux interests?

A. Yes.

Q. And prior to the incorporation of the California corporation, Miller & Lux in 1897, in what form were the Miller & Lux properties held?

1226 A. Henry Miller and Charles Lux; Henry Miller, surviving partner.

Q. In partnership form?

A. In partnership form.

Q. Between Henry Miller and Charles Lux, —partners?

A. Yes.

Q. And upon the death of Mr. Lux, Mr. Miller for himself and as surviving partner of Charles Lux?

1227 A. Yes, sir.

Q. When did Mr. Lux die?

A. 1887.

Q. When was it that the settlement was made with the Lux heirs by Mr. Miller?

A. Do you mean by taking over their interests for bonds?

Q. Yes.

A. 1910.

Q. Mrs. Nickel testified here, Mr. Brown, that Mr. Miller, from October, 1910, up to the time

1228 of his death was down to the office two or three times, and Mr. Campbell, if I remember the testimony correctly, testified he was down there twice. Do you recall how many times you saw Mr. Miller at the office during that period?

A. No.

Q. You do not?

A. No.

Q. Do you recall ever seeing him there during that period?

1229 A. Oh, yes.

Q. As secretary of Miller & Lux, Incorporated, Mr. Brown, you had charge of the minutes of that corporation?

A. Yes.

Q. Have you the minutes with you?

A. Yes.

Q. Will you turn to the minutes with reference to the time that Mr. Nickel became the president of Miller & Lux, Incorporated?

1230 A. September 8, 1914.

Q. Has he continued as president ever since?

A. Yes.

Q. And is now the president?

A. Yes.

Q. Prior to September 8, 1914, Mr. Henry Miller was the president?

A. Yes.

Q. And had been from the time the corporation was formed?

A. Yes.

1231 Q. From the time the corporation was formed in 1905, approximately, up to September 8, 1914, what position did Mr. J. Leroy Nickel occupy?

A. Vice-president.

Q. Who were the other officers of the corporation during that period from 1905 to 1914?

A. I was secretary and the Bank of California, treasurer, I believe.

Q. Were there any appointive positions created by the board of directors or provided by the
1232 by-laws outside of president, vice-president, secretary and treasurer?

A. No.

Q. Was there any position of general manager for the corporation?

Mr. TREADWELL. Of course the by-laws and the articles would be the best evidence if they use that word or not.

Q. I was just asking if the by-laws made such
1233 provision?

A. Mr. Miller was general manager.

Q. Will you look up the by-laws, Mr. Brown, and let us know if there was any position of general manager and, if so, who filled it from the time of the formation of the corporation of Miller & Lux down to the time of Mr. Miller's death?

A. Mr. Miller was known as general manager; he was known as such up to the time September, 1914.

1234 Q. And then did Mr. Nickel become known as the general manager?

A. I cannot recall the name,—the designation.

Q. You might just verify the information from the by-laws or the records there, and let us have it later. Now, how many directors are provided for by the by-laws of Miller & Lux, Incorporated?

A. Five.

1235 Q. And the directors chosen at the time of the organization of the corporation in 1905 were whom?

A. Edward T. Allen, Thomas B. Bishop, Gustav Gutsch, Arzo N. Lewis, Henry Miller, Louis F. Monteagle, J. Leroy Nickel.

Q. That makes seven, doesn't it, Mr. Brown?

A. Yes.

Q. Well, the articles must provide for seven directors?

1236 A. At that time.

Q. How long did,—when was it that it was changed to five?

A. March, 1911, I believe.

Q. Were there any changes in the directorate from the names you have given us up to 1911, and, if so, what?

A. I will have to look for every year. I see the change made in 1908, and follow it up afterwards: 1908 I find the name of George C. Sargent appearing,—he took the place of Thomas

1237 B. Bishop, deceased. 1909 the name of Frank B. Anderson appears.

Q. In whose place?

Mr. Treadwell. Read the first names you have there.

Mr. Peart. You have given us as the first directors Edward T. Allen, Thomas B. Bishop, Gustav Gutsch, Arzo N. Lewis, Henry Miller, Louis F. Monteagle, J. Leroy Nickel. Then Bishop was replaced by Sargent and Anderson
1238 took somebody's place.

A. Mr. Sargent's name does not appear in 1909. Sargent was succeeded by Anderson; George C. Sargent comes in in 1910. Louis F. Monteagle went out in 1910 and Mr. George C. Sargent put in his place. Monteagle went out and Bishop had died,—Sargent took Monteagle's place. Then the amended articles began with five directors.

Q. And who served on the first board with
1239 the five directors?

A. Frank B. Anderson, David Brown, C. Z. Merritt, Henry Miller, J. Leroy Nickel.

Q. And the date of that change in the directorate is shown by the minute book to be what?

A. The 17th of March, 1911.

Q. Shortly before that the directorate had been reduced?

A. Yes.

Q. Those directors continued in office ever since, Mr. Brown?

A. I believe until September, 1914.

1240 Mr. TREADWELL. What was the first meeting in 1913?

A. The 12th of May, 1913.

Q. Who were present at that meeting, the 12th of May?

A. Present: Vice-president Nickel, directors Anderson and Brown.

Mr. TREADWELL. That was a directors' meeting, wasn't it?

A. Yes,—directors' meeting.

1241 Mr. TREADWELL. Give the dates,—what was done in 1913?

A. March 10, 1913.

Q. What meeting was that,—stockholders or directors, March, 1910?

A. Stockholders.

Q. Held or passed for the year?

Mr. TREADWELL. Give what your minutes show on that date.

A. There was no quorum present and the

1242 quorum not appearing the meeting adjourned.

Q. Now, we are still on the—the main trend is to get the directorate up to the time of Mr. Miller's death. We have the five directors that went out in 1911. Just go through the minute book, Mr. Brown, and see if they remained the same up to the time of his death.

A. 11th of March, 1912, the directors elected were Frank B. Anderson, Henry Miller, J. Leroy Nickel, George W. Nickel and David Brown.

Q. That meeting was held when?

1243 A. March 11, 1912.

Q. Now, the stockholders' meeting for 1913 was adjourned without a meeting?

A. Wait a minute,—let me follow this up. Stockholders meeting 8th of September, 1914. Directors elected were Frank B. Anderson, David Brown, C. Z. Merritt, William S. Mitchell, J. Leroy Nickel.

Q. Was that a special or regular meeting?

A. An adjourned meeting.

1244 Q. Adjourned from what date, Mr. Brown?

A. Adjourned from March 9, 1914.

Q. Was the adjournment taken, as shown by the minutes of the meeting held on the 9th of March, 1914, to the 8th day of September, 1914?

A. Yes.

Q. Was the 9th of March the fixed day for the annual meeting of the stockholders, according to the by-laws?

A. Yes.

1245 Q. Did you attend both meetings?

A. Yes.

Q. Will you read just what the minutes of March 9th show in reference to the adjournment?

A. (Reading). At the appointed hour on this day for the annual meeting of the stockholders of Miller & Lux, Incorporated, there was no quorum present and the quorum not appearing C. Z. Merritt adjourned the meeting until Tuesday, the 8th day of September next, at eleven o'clock A. M.

1246 Q. Now, did the directors whose names you have just read continue in these positions up to the present time?

A. Yes.

Q. Who is Mr. Mitchell?

A. He is an employee of Miller & Lux, Incorporated,—Mr. Nickel's confidential man,—assistant,—I do not know exactly what the position is. He assists Mr. Nickel,—takes Mr. Nickel's orders, brings letters to him, and takes his

1247 orders.

Q. Is he a stenographer?

A. No.

Q. Do you know whether Mr. E. T. Allen is dead?

A. He is alive.

Q. He was a personal friend of Mr. Miller's, was he not?

A. He is a friend,—more a friend of the Lux people,—related more closely to the Lux people.

1248 Q. How long have you known Henry Miller?

A. I first met him in 1882,—the first time.

Q. How long have you been in the employ of Miller & Lux, or in whatever form it was being operated?

A. I was with them for a while in 1883, and resigned; I joined them again in 1884.

Q. Have you been with them ever since?

A. Ever since.

Q. In the deed of trust which Mr. Miller executed on the 17th day of April, 1913, mention

1249 is made of the shares of capital stock of the Las Animas & San Joaquin Land Company, Incorporated,—you did not mention that among the list of subsidiary corporations?

A. There is no such corporation now.

Q. What became of it?

A. It dissolved.

Q. Was it in existence in April, 1913?

A. It dissolved the 15th of April, 1913.

Q. On the 15th of April?

1250 A. That is the date.

Q. By proceedings of court or by operation of statute, for failure to pay tax?

A. Certificate of dissolution.

Q. Certificate of dissolution?

A. Yes, sir.

Q. By the court of what county?

A. Secretary of State.

Q. Will you let me have that certificate, please?

Witness hands certificate to Mr. Peart.

1251 Q. This was a corporation of Nevada was it, Mr. Brown?

A. Yes, sir.

Q. And according to the certificate—the certified copy of the Secretary of State of the State of Nevada it was dissolved as a corporation April 15, 1913?

A. Yes, sir.

Q. By the act of the stockholders of that corporation?

A. Yes, sir.

1252 Q. What Miller & Lux properties, if any, formed the assets of this corporation?

A. The assets of that corporation all belong to Henry Miller.

Q. What particular properties,—where were they situated?

A. Scattered. Principally in Santa Clara county, San Benito county, Monterey county, San Luis Obospi county, a little in Madera county, Kern county, Kings county, Ventura
1253 county, Fresno county, Merced county.

Q. Those assets, Mr. Brown, were transferred to Miller & Lux, Incorporated?

A. Yes.

Q. Prior to the dissolution?

A. Yes.

Q. Was there any stock or bond issue made by Miller & Lux, Incorporated for these assets that were transferred to it by the Las Animas & San Joaquin Land Company?

1254 A. Yes, I think so; I believe there was.

Q. Who were the stockholders of the Las Animas & San Joaquin Land Company?

A. You mean the directors?

Q. No, the stockholders. Did Henry Miller own all of the stock?

A. Practically; yes, practically all except for the directors.

Q. Was there any issue of stock made to Mr. Henry Miller, and Miller & Lux, Incorporated, upon receipt of these properties of the

1255 Las Animas & San Joaquin Land Company by Miller & Lux, Incorporated?

A. I think I would have to read the minutes. I haven't the book here. I cannot place it in mind because——

Mr. PEART. Could we prefer this kind of request, Mr. Treadwell,—that the various stock and bond issues of Miller & Lux, Incorporated, be presented in a table with the dates of issuance of the various shares of stocks by that cor-

1256 poration and properties received in exchange therefor, and to whom stocks and bonds were issued, so far as is pertinent to these proceedings?

Mr. TREADWELL. Yes; the only thing is, there is only one bond issue, so far as bonds are concerned, issued at one time, and the bonds may not be actually sold; one bond issue, I mean. Certain of the properties of Las Animas & San Joaquin Land Co. were taken over for those

1257 bonds.

Mr. PEART. Can we have it just in general,—we do not want the particulars, but just in general.

Mr. TREADWELL. The balance of the property was simply conveyed without a bond issue.

Mr. PEART. Q. Now, Miller & Lux, a California corporation, was dissolved by operation of statute about 1905, if I remember correctly?

A. Yes.

1258 Q. At the time that its dissolution was effected by operation of statute in 1905 did it own any property of any kind?

A. No.

Q. What had become of its properties and assets?

A. They were all conveyed to Miller & Lux, Incorporated.

Q. Have you among the corporate records and papers a resignation from Mr. Miller as
1259 director and president of Miller & Lux, Incorporated?

A. I do not think so.

Q. I think you stated that he had resigned.

A. In September, 1914, at the stockholders meeting he was not elected a director; he had been up to that time.

Q. The meeting of May, 1914,—there was no communication received at that meeting from Mr. Miller personally, was there, Mr. Brown, in
1260 reference to the selection or non-selection of himself as a director?

A. Not that I know of.

Q. You attended the meeting in your capacity as secretary and director?

A. Yes.

Q. Do you know when Mr. Nickel acquired the thirty-five shares of stock which appear in his name as stockholder at this time,—September 8, 1914?

A. 1908.

1261 Q. And from whom did he acquire those shares?

A. I am sure I cannot say at present.

Q. Well, will you look that up, Mr. Brown?

A. I will.

Q. Mrs. Nellie Nickel appears to be the owner of 93¼ shares?

A. Yes.

Q. Can you tell from your records when and from whom she acquired those shares?

1262 A. No, I cannot tell.

Q. Will you look that up?

A. She was one of her mother's heirs who held stock, who received stock as an heir of Mrs. Lux.

Q. As an heir of Mrs. Lux. That is where 93¼ shares came from?

A. I presume from her mother.

Q. Will you verify that for us, please, and the date?

1263 A. Yes.

Q. As I understand it, the minutes show that the stockholders meeting which would fall regularly on March 9, 1914, was adjourned until September 8, 1914?

A. Yes.

Q. Now, was the meeting for the previous year, which would fall around March, 1913, was that held as usual, do you recall?

A. I cannot recall. I believe——

Q. It was?

1264 A. I cannot recall. You are asking of the meeting of 1912?

Q. No, the annual meeting of 1913.

A. March 12, 1913, the meeting adjourned, a quorum not being present.

Q. Was there any stockholders meeting held through the year 1913?

A. No.

Q. Now, take the year 1912, then, I think you gave us the persons who were elected di-
1265 rectors in 1912; let us verify that again.

A. Frank B. Anderson, Henry Miller, J. Leroy Nickel and George W. Nickel and David Brown.

Q. Now, when did the board organize following that meeting, by the selection of officers?

A. Immediately.

Q. And the date is what?

A. 11th of March, 1912.

Q. Yes; the stockholders meeting is what
1266 particular day in March?

A. The 11th.

Q. And the directors meeting on the same day?

A. On the same day.

Q. Who were elected the officers there at that meeting?

A. Henry Miller, president; J. Leroy Nickel, vice-president; David Brown, secretary; C. Z. Merritt, assistant secretary; Bank of California, a national association, treasurer; State Agent

1267 and Transfer Syndicate, Incorporated, was elected resident agent in Nevada.

Q. Those officers, according to the records of the corporation, remained in this way, without change up to September 8, 1914, taking office March 11, 1912,—is that correct?

A. What was the question? They remained until their successors were elected.

Q. Yes. And the successors, as directors and officers were not elected until the meeting held
1268 on September 8, 1914?

A. No.

Q. Was there any change in the meantime?

A. No.

Q. No change in the meantime?

A. I do not believe so.

Q. Your previous answer is "no". I do not know that I understand it, Mr. Brown. I think we traced back that there were no meetings in 1913?

1269

A. Stockholders.

Q. Yes; consequently the directorate remained the same?

A. Yes.

Q. From March 11, 1912, up to September 8, 1914?

A. Yes.

Q. Did the officers remain the same throughout that period?

A. Yes.

1270 Q. Now, in the minutes of September 8, 1914, reference is made to the indisposition of Mr. Miller,—I think you will find that there?

A. Yes.

Q. A statement to that effect,—who made that statement?

A. I cannot tell. We all understood he was not as robust as he once was.

Q. And unable to carry on his duties?

A. Probably Mr. Nickel made it.

1271 Q. Well, as a matter of fact, you knew he had not been down there scarcely at all since 1910?

A. I do not know that. I am very sure that he was there,—time goes so quickly,—but I think he was.

Q. But the nurse who was with him constantly, Mr. Campbell, testified that he only took him down there twice, and Mrs. Nickel, his daughter, testified that he was only down there

1272 two or three times, if my memory serves me right, owing to the distance of the offices from the elevator, and the difficulty Mr. Miller had in moving about. You will be inclined to take their statement?

A. They would know better. I would only see him,—if he came in, to raise my eyes, and say "How do you do", or "How are you",—raising my eyes and seeing Mr. Miller that way,—there was nothing to impress it upon my mind.

1273 Q. Mr. Miller, prior to October, 1910, was a very active man, was he not?

A. He tried to be.

Q. He was out of doors a great deal, going over the different ranches and properties?

A. Yes, his feet began to trouble him with gout or something; in the middle of the trip he would have to give it up and come back; come back and take a rest.

Q. Your particular duties have been, as I
1274 understand it, to attend to transfers of land and taxes, and the corporate records?

A. Yes; contracts for sales.

Q. Contracts for sale of what?

A. Land.

Q. Nothing to do with the cattle business?

A. No.

Q. Does the corporation make a practice of selling any land, Mr. Brown?

A. Yes.

1275 Q. To settlers, for development?

A. We try to.

Q. Has it a department for that purpose, in your charge, for that purpose?

A. It is part of my duties. They have the offices on the ranches, but I try to keep track of the deeds that come in, to present to the president and vice-president to sign, and I am responsible, and want to know the money has been paid, the full details as to taxes, etc., before the deed goes out.

1276 Q. At what points of the company's holdings has it been engaged in selling lands, say during the past five years?

A. Dos Palos.

Q. In what county?

A. It is on the border. The colony you are speaking of,—the office. The colony is in Merced and Fresno counties. I forget for the moment where the office is,—the colony is in Merced and Fresno counties.

1277 Q. And how much land is the company attempting to dispose of there?

A. Well, probably about ten sections.

Q. In subdivisions of what size,—that is, small parcels or what size?

A. The lots originally were,—they have several subdivisions one lot was partially worked off, and a new survey was made.

Q. No, I mean in units,—what size?

A. Twenty acres and ten acres.

1278 Q. Is that land irrigated, under ditch?

A. Yes.

Q. The water is furnished by Miller & Lux?

A. No.

Q. By whom,—by what system?

A. San Joaquin Canal Co.

Q. That is a subsidiary of Miller & Lux?

A. Yes. One moment,—they own the majority of stock.

Q. Meaning the one I have referred to as a subsidiary company?

1279 A. Yes.

Q. Is the company engaged in selling land anywhere else?

A. About Los Banos, in Merced county; it has its office in Gustine.

Q. And anywhere else?

A. I do not recall; no, that is all.

Q. At three points?

A. Yes.

Q. They are engaged in selling lands?

1280 A. Yes.

Q. And those sales have been going on for more than five years past?

A. Yes.

Q. When did the company first undertake to sell land,—how long ago?

A. In the nineties,—the date I cannot tell.

Q. Has it been selling continuously ever since?

1281 A. In earlier times it had a promoter, they called him,—Bernard Marks, used to be the principal of the Lincoln School, and I think he had a connection in the east and he used to travel himself,—tried to get colonists,—on a commission from Miller & Lux. He could not make anything more out of it, and then Miller & Lux used its own offices.

Q. What quantity of land has the company endeavored to sell, or sold portions from at Gustine?

1282 A. The town of Gustine, they laid out on a little land, a section or a section and a half.

Q. And at Los Banos,—how much has been sold there in all?

A. I mean either sold, Mr. Brown, or regarded as subject to sale, by the company,—set aside for sale?

A. About half a dozen sections.

Q. What portion of the ten sections at Dos Palos has been sold?

1283 A. I cannot tell. Some of the central part has been almost cleaned out and other parts do not seem to sell. It is a spotty country; there is alkali.

Q. What prices does the company ask for that land?

A. At first the price was $60., of which $20 went to Marks and $40. to the company.

Q. Per acre?

A. Per acre.

1284 Q. Payable how, immediately, in cash?

A. No.

Q. Payments extending over what periods?

A. Well, not over four or five years about. Mr. Miller was very lenient. We have contracts made fifteen years ago which Miller & Lux have taken in now,—the people cannot make it; $60. an acre.

Q. Was there a rate of interest fixed on deferred payments?

A. Six per cent.

1285 Q. How about the water,—was that included in the price per acre?

A. No; they bought their water from the canal company.

Q. From the canal company,—at what rate?

A. I do not know; I am not familiar with that.

Q. There are no other points, either in or out of California, where the company has ever at-

1286 tempted to sell or sold any lands say in the last fifteen years?

A. No; they have sold one ranch in Merced and Mariposa counties,—they disposed of that completely.

Q. Well, I mean by subdivisions?

A. Subdivisions? No.

Q. The ranch you mention in Merced and Mariposa was simply sold as a whole?

A. As a whole,—the Shippe ranch.

1287 Mr. TREADWELL. I don't know that you got the question, Mr. Brown. The company have tried to sell——

A. There have been places in Madera, but there have not been any sold.

Q. An isolated ranch at Madera?

A. No.

Q. A subdivision made there?

A. Yes.

Q. How many sections?

1288 A. I do not know; not over three or four; my attention has not been called to it; perhaps only two. There has not been a sale.

Mr. TREADWELL. We want to sell but nobody will buy. Answer his question fully; if that is what he is after we will give it to him.

Mr. PEART. We might as well find out now; it will be of some assistance later on.

A. We entered into arrangements with the Pacific Improvement Company,—conveyed the
1289 land to the Pacific Improvement Company,—they to lay out the town, attend to all the sales, and Miller & Lux I think got half the net proceeds. Now, the most of the land has been turned back by the Pacific Improvement Company,—they cannot do anything with it.

Q. What point?

A. On the railroad,—South Dos Palos. Another at Mendota, Firebaugh, Volta, Button Willow in Kern County.

1290 Q. Those were all propositions that you had up with the Pacific Improvement Company?

Mr. TREADWELL. Below Kern.

A. Button Willow,—the same township.

Q. You attend, as part of your duties, to the land taxes of the corporation?

A. Yes.

Q. Do you also attend to the franchise or other taxes levied upon the lands?

A. I see that they are paid; yes.

1291 Q. The corporation has had more or less litigation in reference to its franchise and state taxes?

A. Yes.

Q. How many suits has the corporation had?

A. I cannot tell.

Q. A good many, has it not?

A. I cannot tell,—I pay no attention to that end of it.

1292 Mr. TREADWELL. We will accept the same valuation in this proposition, if the state will take the same position that it insisted on in that franchise tax case. We will discontinue this hearing right now. The state said our property was not worth anything,—therefore the value all lay in the franchise,—that would bring our property down to a very small amount.

Q. Aside from that, had you any other duties with the corporation, Mr. Brown,—the taxes, the 1293 land transfers, and as corporation secretary with the records?

A. None.

Q. None other?

A. No.

Q. Now, did you have similar duties under Miller & Lux, a California corporation?

A. Yes.

Q. And similar duties under the partnership of Miller & Lux?

A. Yes.

1294 Q. In other words, since your connection with the Miller & Lux interests in 1884, your duties have always been along the same lines?

A. Since 1888.

Q. 1888?

A. Yes, along the same lines.

Q. How long has Mr. Nickel been connected with the Miller & Lux interests?

A. Since he married Mrs. Nickel, I guess; 1886 or 1887, I cannot tell the year,—1887 prob-

1295 ably.

Q. Wasn't he in the employ of Mr. Miller prior to his marriage with Mrs. Nickel?

A. No.

Q. Or in the employ of Miller & Lux?

A. No.

Q. Did you come in contact,—personal contact, with Mr. Miller?

A. Yes.

Q. Very often?

1296 A. Yes.

Q. You knew him intimately, did you?

A. Yes.

Q. And had known him since 1882 in rather an intimate way?

A. Did I say 1882?

Q. In 1882 you entered their employ.

A. The last days of 1882,—1883, I would say; yes.

Q. Did you ever go out to visit him at the home on Laguna street, after he was taken ill in October, 1910?

1297 A. No.

Q. Never at any time?

A. No.

Q. You did not see him then excepting on those occasions when he might have visited the office, from the time he was taken ill in October, 1910, up to the time he died?

A. I only saw him in the office,—the last time I saw him was in the office.

Q. Did you have any talk with him when he
1298 was in the office on those occasions?

A. He shook hands with me, and I hoped he was improving,—one or two commonplace words.

Q. You did not feel that you cared to go out to the house,—was it that it didn't just occur to you or not?

A. Well, I didn't want to bother him. He was a man who was peculiar in his ways,—some ways; solitary in a way.

Q. When he was afterwards down at the
1299 office, and you were there in charge of your department, did he ever discuss with you at length the different moves that he was making of the corporation?

A. No.

Q. Did he ever take you into his confidence as to his plans for this property or that?

A. No.

Q. Pretty self-contained man, was he?

A. Self-contained.

1300 Q. You cannot recall whether there was anything stated, except that Mr. Miller was not able to act any longer as president at the time of this meeting in 1914 when he was not elected to the board?

A. Nothing else.

Q. Just a general statement was made?

A. Just verbal. Nothing formal to go in the minutes. I put it that way because the by-laws, I believe, provide that during the absence
1301 or disability of the president, the vice-president should preside.

Q. Do you know Miss Thomas, one of the stenographers in the office?

A. Yes.

Q. From the time that Mr. Miller was taken ill in October, 1910, he for some time, according to the testimony that has been given here, would write out letters of instructions to his various superintendents,—did you ever receive any such
1302 letters from him?

A. I know that he did; I have seen the letters?

Q. You have seen the letters?

A. Yes, I saw them. Anyone can see them who will look back,—the stenographer's duplicate; they were filed away.

Q. It has been testified here, Mr. Brown, that for some time he wrote them himself, and then began to use a stenographer at a later date if I understand the testimony correctly; is that so?

1303 A. He gradually began to use a stenographer before he was ill.

Q. Do you recall Miss Thomas going out to the house to take dictation from Mr. Miller? Would that come within your observation in the office?

A. Certainly I knew she constantly went.

Q. Can you say definitely whether or not she continued to go out and take Mr. Miller's dictation, up to, I think the testimony is, the summer
1304 of 1914?

A. I cannot say.

Q. You could not be sure as to how long she continued to go out to take that dictation?

A. No.

Q. But you know for quite a period after he became ill that she did go out to the house to take the dictation?

A. Yes.

Q. Did Mr. Miller ever have occasion to
1305 send any message to you through her?

A. No, I do not recall any message from him.

Q. Did you ever, while Mr. Miller was out at the house, prepare papers for deeds, for sales of land, for Mr. Miller's signature?

A. Very rarely, if ever; still, there may have been one or two occasions in which it was done, but it was not the custom.

Q. It was not the custom?

A. The vice-president would sign them.

Q. Was it Mr. Miller's custom to sign checks of the corporation?

1306 A. No.

Q. Did he always leave that to the office staff?

A. Yes.

Q. Different members of the office staff were authorized to sign checks for all purposes?

A. Yes.

Q. And Mr. Miller never troubled himself with details of that character?

A. It was unusual if he did; there may have
1307 been occasions when necessity required him to do so, but it was very unusual.

Q. His interests there were more centered upon the operation of the ranches and the handling of the cattle, the buying and selling of the cattle,—the outside life rather than the office end?

A. Entirely.

Q. That is what I gained from the testimony.

A. He would come back from a long trip,
1308 be in the office three or four days, get tired of the office and then go out in the country.

Q. What are the present administrative divisions of Miller & Lux, if you have them in mind. As I understand from Mr. Nickel's testimony, the properties of the corporation are administered in divisions?

A. Yes.

Q. Have you in mind the various divisions?

A. No.

Q. That is not within your province?

1309 A. No, except some of the old divisions, but Mr. Nickel has made new ones and I do not follow them.

Mr. PEART. I do not believe we have the authorized capital; that will be given us, Mr. Treadwell, with other statements?

Mr. TREADWELL. Yes.

Mr. PEART. Of this particular company,—the whole incorporation?

1310 Mr. TREADWELL. Yes.

Mr. PEART. That is all at this time.

Witness temporarily dismissed.

At this time (4:40) the hearing adjourned to Tuesday, December 5, 1916, at 2 o'clock P. M.

1311

Wednesday, December 13, 1916.

No. 304 Humboldt Bank Building

San Francisco, California

2:00 P. M.

The hearing before Inheritance Tax Appraiser R. F. Mogan, in the matter of the estate of Henry Miller, deceased, No. 21,686, Dept. No. 9, probate, adjourned from Tuesday, November

1312 28, 1916, was continued at the above time and place.

Appearing for the State of California and John S. Chambers, State Controller,

Wm. A. Sullivan,

Asst. Inheritance Tax Attorney, and

Hartley F. Peart,

Special Counsel for State Controller.

Appearing for the executors and

1313 trustees of the estate of Henry Miller, deceased, and as personal representative of Mrs. Nellie Miller Nickel and J. Leroy Nickel,

Edward F. Treadwell.

Appearing for the Department of Internal Revenue, First District of California,

P. H. Wood.

1314

Thereupon

BEATRICE SARAH NICKEL

called by the State of California, was duly sworn and testified as follows:

Mr. PEART. Q. Miss Nickel, your name is Beatrice Sarah Nickel?

A. Yes.

Q. And you are a daughter of Mr. and Mrs. J. Leroy Nickel?

1315 A. Yes.

Q. And you reside with them at the residence on Laguna Street, this city?

A. Yes.

Q. How long,—have you always resided with your father and mother?

A. Yes, except when I was at school.

Q. When were you away at school?

A. 1907, I think I was at school; after the earthquake I went to Santa Barbara to school,
1316 then afterwards I went east for four years,—New York.

Q. When did you return from New York?

A. In November, 1912, I left school in May and went to Europe and got back in November,—the 5th or 6th of November, I think.

Q. And when you were at school in New York did you return during the vacation period?

A. Just during the summertime.

Q. And how long were the vacations?

1317 A. From the end of May until the 1st of October, but I was away most of the time then.

Q. You were away visiting friends throughout the state?

A. Yes.

Q. Do you recall the occasion of your grandfather's illness in October, 1910?

A. I knew he had been sick, but I do not know when because I have not been at home.

Q. You were away at school when that happened?

1318 A. Yes, I was in the east for four years.

Q. And after October, 1910, when did you first see your grandfather?

A. Not until 1911, when I came back from school in May.

Q. And during the summer vacation of 1911, for such period as you remained at home, you would see your grandfather?

A. I would see him occasionally.

Q. How often would you see him during that
1319 particular summer vacation?

A. I do not know.

Q. You could not remember?

A. I could not remember.

Q. Do you recall,—you were away from home very much?

A. No, I do not; I have not the slightest idea; I was visiting friends.

Q. And in the following year, May, 1912, you were at school?

1320 A. I was in Europe until November.

Q. And you came back then in November, 1912, and have remained at your home ever since?

A. Yes, excepting when I have been away.

Q. Now, from November, 1912, up to the time of your grandfather's death, did you see him very often?

A. Probably every other day,—just to go in to say "How do you do",—that was all.

1321 Q. Did you remain for any period of time when you went in to see him?

A. About ten minutes.

Q. And you would go into the sitting room? Or his bedroom?

A. His sitting room.

Q. And you usually remained about ten minutes; can you recall what you talked with him about?

A. When I had been down to the ranches; he
1322 asked me about my friends.

Q. And you would reply to those inquiries?

A. Yes, I would always tell him when I had been down there and what I saw.

Q. What was the character of conversation you always had with him?

A. That was about all; he never talked very much; he was hard to talk to because he was deaf.

Q. Was he more difficult to talk to, say, dur-
1323 ing the last year of his life?

A. Not any more so.

Q. Did he seem interested in your conversation?

A. He was always interested, yes; where I had been and where I was going.

Q. And that same interest, same degree of interest, was manifest, so far as you can observe, in the same intensity throughout all the times you visited?

1324 A. Yes, but I did not see him for about two months because I had been away practically all that time.

Q. Two months?

A. Two or three months, because I had been away all summer.

Q. Did you make any particular trips to the ranches of Miller & Lux?

A. Two or three times a year.

Q. What particular ranches did you visit?

1325 A. San Joaquin; went to Gilroy quite often; Firebaugh.

Q. You would go to one or the other of these ranches several times a year?

A. Yes.

Q. Since 1912?

A. When I was still at school I used to go down.

Q. What inquiry would your grandfather makes about the ranches?

1326 A. Just ask me what I had seen.

Q. Did he ask about anything in particular,—about cattle?

A. He knew I knew nothing, so he never asked me about such matters.

Q. Did he ever discuss with you the trust deed or his will?

A. No; no business was ever discussed in front of me.

Q. The trust deed I am referring to was executed in April, 1913.

1327 A. No, he never discussed anything with me.

Q. He never said anything to you about either one of those documents?

A. Not a thing.

Q. He never said anything to you about the codicil to his will?

A. Not a thing.

Q. He never discussed business with you?

A. He never discussed business at all.

Q. Did he ever discuss with you his desires
1328 in regard to the disposition of his property?

A. He never said a word.

Q. During all of this time,—after you came to live permanently at home,—you had finished school and had a trip to Europe,—the two nurses were in the house?

A. Yes.

Q. Mr. Campbell and Mr. Lane?

A. Yes.

Q. You never had anything to do with the
1329 medicines that your grandfather received, or the treatment that he received?

A. Absolutely no.

Q. Did you know anything about it?

A. No, I cannot remember anything about that part.

Q. Did you ever accompany your grandfather on any of the trips that he made?

A. I went to Arrowhead with him, but I do not know when that was.

Q. I think it was in 1911.

1330 Mrs. Nickel. Yes.

A. But I was only there a week.

Q. You went down with him?

A. I left there and went to Santa Barbara and came back again.

Q. What was his condition of health at that time, as you observed it?

A. He was around because he went out in the machine.

Q. The nurses were with him at that time?

1331 A. Yes.

Q. You never accompanied your grandfather on any trips that he made to Gilroy?

A. Well, we were in Gilroy before we went to Arrowhead.

Q. Were you with him on that occasion?

A. I was down there I think; that was just before we went to Arrowhead.

Q. And were you there before he came down, or did you go down with him?

1332 A. I don't know; I don't remember.

Q. You remember being there at that time?

A. Yes, I do.

Q. Did you go about with your grandfather on the ranch at all?

A. No, I did not; I went out in the machine some time.

Q. When you were out in the machine on that occasion of that trip to Gilroy what would he do, if anything?

A. Nothing.

1333 Q. Would he see anyone at all?

A. I don't remember; there was always someone in the machine.

Q. He just rode about over the ranch?

A. Yes.

Q. Did he stop to talk with anyone?

A. I don't remember, probably; I only went out once or twice.

Q. Did anyone call on him at the residence at Gilroy?

1334

A. I couldn't tell you that, either.

Q. Aside from your grandfather's deafness, did you notice anything else about his physical condition when you went in to see him at the residence on Laguna Street?

A. I said I saw him very seldom.

Q. How often would you call on him after November, 1912?

A. It just depended; I have been out with

1335 him in the machine.

Q. Would it be once a week?

A. Just about,—just to say "How do you do", because he would be reading.

Q. And you would only remain about ten minutes?

A. Half the time not that long.

Q. Just to pay him the deference of a call and please him a little bit in that way?

A. Yes.

1336 Q. And if you had happened to be away at one of the ranches and had come back you would speak of that?

A. Yes, I would always tell him of my trips.

Q. He would make some inquiry, and you would reply, in general terms?

A. Yes.

Q. Did you ever go out riding with your grandfather, to the beach?

A. Just out in the machine.

1337 Q. How many times?

A. I went with him before I went to school and then afterwards; I haven't any idea. Before I went to school, a number of times.

Q. Back in what year, say?

A. I guess always while I was in school,—1908 I went to school, then when I came home in vacation I would go out.

Q. Prior to 1910 he did not go out in the limousine at all, as I understand the testimony;

1338 October, 1910, was the time he had the illness?

A. No, he was not at the house.

Q. Therefore, when you made more frequent trips it would be in the vacation period of 1911?

A. Yes.

Q. And after you returned from Europe in 1912 how often would you go out with him in the machine here in the city?

A. Not very often.

Q. How many times in all could you say, Miss Nickel?

1339 A. I really could not tell because I cannot remember,—that is three years ago.

Q. When you would make these trips with him the nurse, Mr. Campbell, would accompany him?

A. Yes.

Q. Would there be anyone else?

A. My friends sometimes; Miss Jensea sometimes; sometimes I took a friend.

Q. Would your grandfather talk with you?

1340 A. Just ask the names of the streets; that is, he never talked very much.

Q. Would you do anything besides driving about?

A. Sometimes we would go to the Cliff House and have tea.

Q. Would he get out?

A. Yes, he would.

Q. He would get out without assistance?

A. I don't remember; he probably had some-

1341 one just help him out.

Q. Mr. Campbell would be near him?

A. Yes.

Q. Would he have tea with you?

A. Yes.

Q. Sitting at the table with you?

A. Yes.

Q. Do you recall any medicines of any kind he gave to your grandfather at the Cliff House?

A. There was nothing ever given to him that I know of.

1342 Q. Was oxygen taken along in the machine?

A. No,—at least I never saw any.

Q. Did your grandfather ever say anything to you about suffering any pain?

A. He never talked very much to me.

Q. He didn't say anything about that?

A. No.

Q. Your grandfather's apartments in the home were treated by you as though they were a separate residence, as far as he was con-

1343 cerned?

A. No, his sitting room was right next to my room.

Q. You were not in the habit of going in his apartments at all except to make calls?

A. No; that is all.

Q. Otherwise you would not go in either of his rooms at all?

A. No.

Q. And your opportunities of seeing him were

1344 only such as you have described to us here?

A. Yes.

Q. Do you know of his ever having suffered any other attacks of illness prior to October, 1910?

A. Do I know of any?

Q. Yes.

A. None that I know of; I cannot tell.

Q. Prior to the time that your grandfather became ill he was very active, was he not?

A. Always very active.

1345 Q. He was away from home a great deal?

A. A great deal.

Q. His home had been with your father and mother some time,—since the fire?

A. We were always together in the winter. We have been down in Menlo.

Q. In the summer?

A. Yes.

Q. Do you remember the year?

A. We came to town that winter,—1906; then
1346 I went to school the next winter.

Q. Did you ever make any trips to any of the ranches, before you went to school, with your grandfather?

A. No, I never had been down the San Joaquin up to 1912 or 1913, I think.

Q. At the Cliff House would your grandfather talk with anyone?

A. No, we usually went at 2 or 2:30 and there would not be anyone there.

1347 Q. On these trips,—did I ask you whether or not he stopped and talked with anyone on the way?

A. There was no one to talk to.

Q. Not when you were along?

A. No.

Q. That is all, Mr. Treadwell.

Cross-Examination.

Mr. Treadwell. Q. Miss Nickel, did you ever go to the Exposition with your grandfather?

1348 A. I don't think I did.

Q. What was the last time you went out with him?

A. I cannot say.

Q. You cannot say?

A. No.

Q. You went to the golf club with him?

A. Yes, we had lunch out there, but I do not know when that was.

1349 Q. And that was the golf club at Ingleside?

A. Yes.

Q. Where did you have lunch on that occasion?

A. In the main dining room.

Q. Your grandfather got out of the machine, did he?

A. Yes.

Q. You cannot remember about when that

1350 was?

A. I haven't the slightest idea. I do not know whether it was before or after I went to school, or vacation or when.

Mr. Peart. Do you recall whether the nurses were with you or not?

A. I don't remember; I could not really tell.

Mr. Treadwell. That is all.

Mr. Peart. That is all, Miss Nickel.

1351 ELIZABETH E. JENSCA,

called on behalf of the State of California, sworn, testified as follows:

Mr. PEART. Q. What is your name, please?

A. Elizabeth E. Jensca.

Q. And you reside with Mr. and Mrs. J. Leroy Nickel?

A. I do.

Q. At the residence on Laguna street in this city?

1352 A. Yes, sir.

Q. How long have you resided there?

A. Since August 26, 1912.

Q. And prior to that time where did you reside?

A. Well, here in San Francisco; I cannot just exactly say where; I lived on Dolores street, I don't remember just the number, and then part of the time I lived in Menlo.

Q. How did you come to live with Mrs.
1353 Nickel?

A. Mrs. Nickel just asked me to come as her companion; prior to that I was a trained nurse.

Q. You have been there since what time, Miss Jensca?

A. Since the date that I mentioned.

Q. And have lived there continuously at that residence?

A. Yes, with the exception of vacations.

Q. What vacations did you have, Miss Jensca?

1354 A. Just a week, most of the time; last year two weeks; I left the city both times.

Q. That would be in the summertime?

A. I do not know just whether it was summer or fall.

Q. You knew Mr. Henry Miller?

A. I was only with him, just to go in and talk to him occasionally,—not professionally at all,—and when Mrs. Nickel was away I went with him in the machine.

1355 Q. Mr. Miller occupied apartments in the residence?

A. Yes.

Q. And you would,—how often would you see him?

A. I would see him every day.

Q. Every day?

A. Yes.

Q. Both Mr. Campbell and Mr. Lane were in the house when you went there as Mrs. Nickel's

1356 companion?

A. Yes.

Q. And continued there until shortly before Mr. Miller's death?

A. Yes.

Q. Now, would you see Mr. Miller any stated hour each day?

A. No, I would go in to see him in the morning, and say "good morning",—possibly sit down and look at one of the papers for a few minutes and then leave him; I would sit with

1357 him perhaps when the nurses went to their meals,—not always; sometimes he was left alone.

Q. Did you do that voluntarily, or did Mrs. Nickel suggest that she would like to have you do so?

A. No; because there were occasions when he did not have anyone with him; he could be left alone.

Q. Would you usually go in the morning?

A. Nearly always in the morning, to say
1358 "good morning", whether I stayed or not.

Q. And if you went in and stayed in the room, you read the paper while he was reading it,—approximately what hour of the morning would that be?

A. That I could not exactly say; it was usually about eight o'clock; it might have been a few minutes earlier or later,—I could not say.

Q. And you would also accompany Mr. Miller on trips in the automobile?

1359 A. Always when Mrs. Nickel was not there.

Q. You made then, frequent trips in the automobile with him?

A. Quite frequent.

Q. How often during the week would he go out in the automobile, say in the year 1912?

A. At that time, nearly every day; it is very hard for me to remember exactly.

Q. And about the same during the year 1913?

A. Yes.

Q. A little less or a little more?

1360 A. That I could not say; about the same, I think.

Q. When did he commence to lessen his activities in that line?

A. I do not think he lessened much until the last year of his life.

Q. Did you ever make any trips with Mr. Miller to any of the ranches?

A. Just once, and that was in October, 1912.

Q. And what ranch did you go to?

1361 A. Mount Madonna.

Q. Near Gilroy?

A. Yes.

Q. How long did you stay on that trip?

A. I stayed a week and then I came back.

Q. Was that trip made by automobile from San Francisco?

A. No, by train to Gilroy.

Q. Did Mr. Lane and Mr. Campbell accompany Mr. Miller on that trip?

1362 A. Both went with him.

Q. And yourself,—did that complete the party?

A. Yes.

Q. Mrs. Nickel did not go?

A. No.

Q. Was there an automobile arranged for to meet the train at Gilroy?

A. Mr. Miller's own chauffeur met him.

Q. Did he go down from here, taking the machine from San Francisco?

1363 A. Yes, taking the machine from San Francisco.

Q. Now, during the week's stay down there what did Mr. Miller do, so far as you know?

A. He went out in the machine I think every afternoon,—just around the place.

Q. He went driving about the place?

A. Yes.

Q. Accompanied by yourself and Mr. Campbell?

1364 A. Yes.

Q. On all those occasions?

A. Yes.

Q. Did he get out of the machine and walk about?

A. Not that I remember.

Q. Who was the superintendent of Miller & Lux at that point at that time?

A. You mean, who lived there?

Q. Who was in charge of that ranch?

1365 A. They lived there,—Mr. Marquart.

Mrs. Nickel. That wasn't his home,—Mr. Marquart was simply foreman up there.

Mr. Peart. Mr. Marquart is, I understand, the foreman at the Mount Madonna ranch?

A. He was there at that time,—I do not know.

Q. Did Mr. Miller make any trips over to Gilroy where any of the corporation's property was?

A. Not that I remember; I was only there a week.

1366 Q. Did any of the men from Gilroy or any of the adjoining properties call on him there?

A. I could not say.

Q. Do you remember anyone he talked to during that trip?

A. No.

Q. Is it your recollection, Miss Jensen, that he simply took these trips around in the machine observing the country and the ranches without seeing anyone in particular?

1367 A. I do not know of his seeing anyone; I would go out, probably by myself, around the place.

Q. You do not recall his ever getting out in the machine?

A. I do not recall his ever getting out of the machine.

Q. That is the only trip you ever made out of San Francisco with him?

A. That is the only trip.

1368 Q. On the occasion of that trip do you recall whether Mr. Miller talked very much to you or to Mr. Campbell?

A. Well, he did not talk so very much; if he saw improvements of any kind he would make some remark about them, but nothing unusual.

Q. Did he give any instructions or directions to anyone that you know of?

A. Not while I was with him.

Q. Did he write any letters?

A. Well, he used to dictate letters,—I do not know whether he did there or not.

1369 Q. Up to what time, according to your recollection, did he dictate letters at the residence on Laguna street?

A. I could not say because I cannot remember dates well,—the stenographer used to come to the house and he would dictate there.

Q. I think it has been testified to by other witnesses that it was about the summer of 1914 that he dictated to Miss Thomas, from the office. You know Miss Thomas?

1370 A. Yes.

Q. You saw her coming to the house?

A. She came every day, but I could not state the date or year.

Q. How long did she remain?

A. At least an hour; I do not know whether she stayed longer or not.

Q. About what time of the day would she arrive?

A. About 11 o'clock.

1371 Q. Did you ever have occasion to go into the room when she was there?

A. I never went into the room. He did most of his dictating down stairs.

Q. At what time, Miss Jensen, would you say that he confined himself, while in the residence, to his apartments on the second story, almost exclusively?

A. I do not think I could remember the date; I do not think it was less than a year before his death I am sure.

1372 Q. When you went to the house the elevator was already in, I believe?

A. They were putting it in.

Q. At the time you went there?

A. Yes.

Q. Mr. Miller, after its installation, always used the elevator?

A. He always used it to go down stairs.

Q. He had his breakfast, I believe, in his own room?

1373 A. Yes, in his sitting room,—principally in his sitting room; he was always in his sitting room.

Q. Did he always eat his breakfast alone?

A. Yes.

Q. Did you join him at luncheon?

A. Yes.

Q. Often?

A. Every day I was there.

Q. And Mr. Campbell was also present?

1374 A. Yes.

Q. And had his lunch with you?

A. Yes.

Q. And other members of the family also?

A. If they were home.

Q. And his dinner, I understand from the other testimony, he had in his own apartments?

A. Yes.

Q. Alone?

A. Yes.

1375 Q. On the occasion of these automobile trips about San Francisco would you ride inside the car with Mr. Miller?

A. With Mr. Miller.

Q. Would he engage in conversation?

A. Sometimes; sometimes he would not talk at all.

Q. What would he talk about?

A. Just principally things he would see; see building going on, that would interest him, im-

1376 provements; no business at all.

Q. He did not discuss business at all?

A. No.

Q. Would he commence the conversation or would you?

A. He could commence it, unless I saw something of interest that I thought he would care to notice.

Q. Was there any change or decrease in his engaging in conversation, say in the year 1913?

1377 A. No,—just about the same.

Q. All the time?

A. All the time.

Q. In December, 1914?

A. Yes, as far as I could remember.

Q. December, 1915?

A. Yes.

Q. What was the last time that you went out in the automobile with him?

A. I cannot recall; I paid no attention.

Q. Was it two years before his death?

1378 A. Not as long as that.

Q. A year?

A. A shorter time than that.

Q. A year before his death would be October, 1915.

A. 1915,—what was that?

Q. A year before, do you think you went out in October, 1915?

A. Yes, I think so; I would not be positive about that.

1379 Q. You would not be positive?

A. I did not pay any attention to anything like that.

Q. This one trip to Gilroy was the only one that you made out of San Francisco?

A. That is the only trip.

Q. The trips about the city were usually to the Cliff House and along the ocean boulevard?

A. Well, not always; we went to the shopping district sometimes; in fact, we went all around San Francisco.

1380 Q. I think the other testimony shows that he was taken to the fair?

A. Yes, I went with him.

Q. How many times did you go?

A. I could not state,—a number of times; he was very much interested.

Q. Was he interested in any particular exhibits?

A. No, he did not get out of the machine.

Q. He never got out of the machine while you were with him?

1381 A. No.

Q. When he went to the shopping district?

A. No.

Q. He would get out at the Cliff House and have tea?

A. He went into the Cliff House, and had chocolate, tea or whatever he preferred.

Q. And on those occasions Mr. Campbell, the nurse, would go in and have refreshments with you?

1382 A. Yes.

Q. Do you know anything of the different treatments or medicines which Mr. Miller was taking?

A. I paid no attention, because I had nothing to do with them.

Q. You know Dr. Herzstein?

A. Yes.

Q. Subsequent, and at the time of Mr. Miller's death?

1383 A. Yes.

Q. And during all that time Mr. Miller was in the care of two nurses?

A. Yes.

Q. But the course of treatments or medicines given Mr. Miller you know nothing about?

A. No, nothing about them.

Q. He went out in the machine two or three times a week?

A. Oh, yes; when I first went there I went practically every day, unless Mrs. Nickel went.

1384 Q. How long from the time you left the house until your return would you be gone?

A. Two hours, not always; most of the time.

Q. Was the doctor's orders,—that the trips should not exceed that time?

A. That I could not say,—whether the doctor stipulated the time or not.

Q. Did Mr. Campbell control the length of time that the trip was to extend?

A. That I have no knowledge of.

1385 Q. Did Mr. Campbell at any time, to your knowledge, say "you had better return to the house"?

A. Sometimes Mr. Miller himself would say, "I want to go home now"; I do not remember Mr. Campbell saying anything.

Q. Mr. Miller would say that he wanted to return, that he was not feeling strong enough?

A. Just said he was tired,—nothing more interesting to see.

1386 Q. In the discussions that you had with him, when you called on him in his room, or at lunch time, what was the topic of conversation?

A. There was not much; I would see certain things in the paper; I really cannot remember anything else; he was quiet when he was having his meals; he did not say much.

Q. Would you see him during any other time besides the time you went in to remain with him for a few minutes, reading the papers?

A. Yes, sometimes I would go in the evening.

1387 Q. What time did he retire in the evening?

A. Usually about eight,—half past eight, as I remember.

Q. You would go in before that?

A. Yes.

Q. And how long would you remain on those occasions?

A. Sometimes I stayed there half an hour or so,—I would just sit there,—sometimes he would not speak to me at all.

1388 Q. Most of the time would you say?

A. Most of the time.

Q. The other times would you try to interest him with some topics?

A. Yes, if I knew of anything that would interest him.

Q. You would mention it?

A. I would mention it.

Q. He seemed about as interested,—neither more nor less interested,—during the year 1915

1389 in these conversations that you had with him, say during the year 1912?

A. Just about the same.

Q. His condition, so far as you observed, was about the same?

A. The same.

Q. At all times?

A. Yes.

Q. Did he ever discuss with you the will and trust deed made in April, 1913, prior to their execution?

1390 A. Never mentioned it.

Q. Did he ever mention anything about the contents of these documents to you?

A. Never said a word.

Q. Did he ever speak about the disposition of any of his property?

A. Nothing at all.

Q. Did he ever mention the will or trust deed subsequent to their execution?

A. No.

1391 Q. Or anything about the contents of either?

A. No, he said nothing to me at all.

Q. He never mentioned business matters at all?

A. Not at all.

Q. Never said anything about his property?

A. No.

Q. Not anything?

A. No.

Q. When he dictated letters to his steno-

1392 grapher, Miss Thomas, you were in the room?

A. I never went down when she was there.

Q. Did Mr. Treadwell call at the house frequently?

A. I could not really say how frequently; I remember seeing him.

Q. Once or twice?

A. I remember twice, as I recall it.

Q. As companion to Mrs. Nickel, Miss Jensca, you were situated as a member of the family?

A. Yes.

1393 Q. And your apartments were on what floor of the house?

A. The top floor.

Q. Do you recall the signing of any documents at the request of Mr. Miller?

A. Of Mr. Miller?

Q. Yes.

A. Well, I do not remember. I was sent for to sign the will as a witness, that is the only thing I remember.

1394 Q. Do you remember what day that was?

A. No.

Q. Do you remember that year?

A. I think it was 1913.

Q. And who was present when the will was signed?

A. Mr. Miller, Mr. Treadwell, Mrs. Nickel, I think, Mr. Mason and myself,—and Mr. Campbell.

Q. That was all?

1395 A. That was all.

Q. What room was that done in?

A. Mr. Miller's sitting room.

Q. At what hour of the day?

A. I do not remember that.

Q. Who sent for you?

A. Well, I don't remember who came for me; I was in another part of the house.

Q. Somebody came and requested you——

A. To go into Mr. Miller's room.

Q. Where was Mr. Miller?

1396 A. What is it?

Q. Where was Mr. Miller when you went in?

A. In the sitting room, in his usual chair.

Q. Sitting down?

A. Yes.

Q. Did he have any papers,—did you see any papers?

A. Well, the will was there.

Q. The will was there?

A. Yes, I do not know whether I saw any
1397 other papers or not.

Q. Did he sign his name?

A. He signed his name.

Q. Did he move to the table, or was it moved to him?

A. I do not remember. He always had a table beside his chair—whether he went over to the desk,—there was also a desk in the room,—I cannot remember.

Q. And he signed his name?

1398 A. As far as I can remember; I do not remember all the details.

Q. And do you remember signing your name?

A. Yes.

Q. As a witness?

A. As a witness.

Q. Did anything further happen at that time that you remember?

A. No.

Q. Then you left the room?

A. I left the room.

1399 Q. Did you witness more than one document for Mr. Miller?

A. I remember only signing one document.

Q. Did Mr. Miller make any statement at all as to what the document was?

A. I do not think he said anything to me, only that it was his will; I cannot remember; I cannot remember dates, especially when I am not personally interested.

Q. Did he say anything more than that this
1400 was his will?

A. I do not know.

Q. If he did, you cannot remember?

A. I cannot remember.

Q. Did you ever see him reading any legal papers of any kind?

A. I do not remember seeing him read any.

Q. At any time when you were in the house?

A. I do not.

Q. By legal papers I mean papers of the
1401 size and shape of this copy of the will (showing witness paper).

A. No, I do not remember seeing him read papers of that kind.

Q. With heavy paper backs on them, such as lawyers use?

A. No.

Q. Did you ever know Mr. Miller prior to the time you became Mrs. Nickel's companion?

A. Yes, I took care of Mrs. Miller ten years ago. I could not state the time, but I think it was eight or ten years ago.

1402 Q. Was Mrs. Miller ill?

A. At that time she was.

Q. Where were Mr. and Mrs. Miller at that time?

A. Essex street.

Q. San Francisco?

A. Yes.

Q. And how long did you remain with them then?

A. I cannot just remember,—a month or five
1403 weeks.

Q. Did you see Mr. Miller,—how often during that period?

A. I saw him, but I could not say how often.

Q. Half a dozen times?

A. Not that many times; he was away when I went there.

Q. He was at that time a hale and hearty man?

A. Yes.

1404 Q. Did you notice any difference in Mr. Miller's voice at that time when you were attending Mrs. Miller and the time you first saw him, after you went out to the house?

A. I did not pay any attention to that.

Q. Was his hearing about the same?

A. What do you mean? When I was with Mrs. Miller?

Q. Yes.

A. That is an awfully long time to remember; I did not see him very much.

1405 Q. Was his appearance the same?

A. He was always pretty active.

Q. He was a very active and robust man, was he not?

A. Yes.

Q. Did Mr. Miller ever read anything besides the newspapers?

A. He used to read the weekly papers.

Q. What newspapers did he read?

A. All of them.

1406 Q. All the San Francisco papers?

A. All the San Francisco papers.

Q. At least, the "Chronicle" and "Examiner"?

A. "Chronicle", "Examiner", "Bulletin" and "Call."

Q. Mrs. Nickel says he read the "News Letter", "Town Talk", "The Argonaut" and the "Wasp".

A. Yes, he did.

1407 Q. Did he read any other magazines?

A. Not that I remember.

Q. Do you remember his reading the "Outlook"?

A. Not that I know of.

Q. Did you ever see it in his room?

A. I do not know; I was taking the "Outlook."

Q. You were taking the "Outlook"?

A. Yes.

Q. Did you read Vice-president Marshall's speech?

1408 A. I do not remember.

Q. Do you recall discussing with Mr. Miller a speech?

A. I do not know; I don't think I discussed anything of that kind.

Q. You never discussed matters of government or legislation with Mr. Miller?

A. Not very much.

Q. Did you ever discuss with Mr. Miller the socialistic tendencies of the time with Mr. Mil-
1409 ler,—what do you mean when you say "not very much",—what did you discuss?

A. I cannot remember. We did not discuss much of anything,—he wanted to know things about concerning the newspapers.

Q. What did he ask you about, concerning the newspapers?

A. Did I see certain things in the newspapers. He did tell me that I did not read them
1410 very well.

Q. What would he ask you if you saw,—market reports?

A. Well, I cannot remember,—certain things.

Q. The price of beef, cattle?

A. No, he did not discuss cattle.

Q. Wheat or hay?

A. No.

Q. Lands?

A. No; I never discussed business with him at all.

1411 Q. What was it,—can you recall at all that he would ask you about as possibly appearing in the newspapers?

A. No, I really cannot remember.

Q. Would he discuss the proceedings of the supervisors of San Francisco?

A. Well, I don't think he said anything to me about it.

Q. Did he ever discuss the proceedings of the legislature of the State of California?

1412 A. I don't remember.

Q. You cannot recall what it was that he would criticise you for not discovering in the newspapers?

A. Nothing specially.

Q. I mean mild criticism?

A. Well, he did not think I took particular interest, that is all.

Q. In what?

1413 A. In the paper, in certain things; not any one particular thing.

Q. Can't you recall what those certain things were, Miss Jensen?

A. No.

Q. What was the last time he made such comment as that, if you do recall?

A. I do not really recall the time.

Q. Two or three years ago?

A. It was in the beginning of this year; he was very much interested yet.

1414 Q. He never discussed with you anything about the management of the ranches?

A. Absolutely nothing.

Q. He never discussed with you the future of the properties known as the "Miller & Lux" holdings?

A. No; he never discussed them with me.

Q. He never said anything to you about his he had built up those properties?

A. Oh, well, perhaps he told me little inci-
1415 dents of early days, but nothing of recent events.

Q. Did Mr. Miller ever refer to his success in the world and his reasons,—any reason for feeling proud or satisfied with what he had done?

A. I do not remember his ever having said anything to me in regard to that.

Q. Did he ever say anything to you about how he had worked and struggled to amass this great property?

1416 A. He told me how he worked and how he used to be out in the early days, but nothing special.

Q. He was very proud of what he had done?

A. I think he was.

Q. Did he ever say anything about it?

A. Nothing definitely.

Q. Did he ever say anything indefinitely, so that you could draw that conclusion?

A. No, he would say how he worked,—that was about all.

1417 Q. He never said anything to you about the handling and carrying on of these properties after he was gone?

A. Absolutely nothing.

Q. He never discussed death?

A. In fact he always would think he would be better; a short time before he died, he said he would go out for a ride and would I go with him.

Q. How long before he died?

1418 A. Possibly about two months, if I remember.

Q. Was he permitted to go on that occasion?

A. Well, he did not go; I think it turned cold.

Q. Mr. Campbell has told us that it was determined by himself whether Mr. Miller should go or not; is that correct, according to your recollection?

A. That I could not state; I was not there

1419 all the time; I was not in the room all the time, so I could know.

Q. That is all, I think, Mr. Treadwell.

Cross-Examination.

Mr. Treadwell. Q. As I understand it, Miss Jensca, you came into the household as Mrs. Nickel's companion, and not for the purpose of taking care of Mr. Miller?

A. Absolutely not; I just came as Mrs. Nickel's companion.

1420 Q. You referred to a short time you were down at Mount Madonna,—was Mrs. Nickel there at that time?

A. Mrs. Nickel was away; she was in Europe.

Q. Who else was there at that time?

A. Mr. Campbell and Mr. Lane and the chauffeur and myself.

Q. Were there any visitors outside of that, do you remember, during the period you were
1421 there?

A. I do not remember; I would not be positive whether Mrs. Robinson was there or not.

Q. And then there was the foreman who kept charge of the properties there?

A. Yes.

Q. In the trips that you took with Mr. Miller around San Francisco, I believe you did mention that you went to the exposition a great many times?

1422 A. Yes, we did.

Q. Did you ever go out in that vicinity with him after the exposition was over?

A. Yes, we went through after it closed, but I could not state just how long after.

Q. At any rate, it was some time after it was closed?

A. Yes.

Q. You stated that you had seen something of Mr. Miller a great many years ago when his wife was living; that was about what year?

1423 A. It was about eleven years ago, I think, Mr. Treadwell. I could not say; I think it was two years before the earthquake.

Q. At the Essex street house before the fire?

A. Yes.

Q. Mrs. Nickel states that it was a year before her mother died. You saw something of Mr. Miller during that period?

A. Very little.

Q. What was the amount of talking that Mr.
1424 Miller did,—did you consider Mr. Miller a garrulous sort of man, or a man of few words?

A. Very few words, Mr. Treadwell.

Q. Was there any material difference in that regard in those days and later years?

A. Well, I saw so little of him in the beginning.

Q. At any rate, he talked as much in the later years as he did in the early years,—that is certain?

1425 A. Yes.

Q. Now, you were a witness to an instrument which you have testified to in the probate court?

A. Yes.

Q. You referred to that as a will,—what is your recollection,—was it a will or a codicil to a will?

A. I do not recollect, Mr. Treadwell.

Q. But you do recollect signing it?

A. I recollect signing it.

1426 Q. I think you said something about Mr. Treadwell being there on the day that was signed,—are you sure of that or not?

A. Well, I could not be positive, Mr. Treadwell. I remember seeing you there.

Q. Of course, you have seen me at the house.

A. Yes, I have seen you at the house.

Q. And if there was a legal document to be executed, you would rather presume I would be there?

1427 A. Yes.

Q. But the witnesses to it are yourself and myself, according to the instrument?

A. Yes.

Mr. TREADWELL. That is all.

Mr. PEART. That is all.

Witness excused.

DAVID BROWN,

1428 recalled by the State of California, testified as follows:

Mr. PEART. Q. Mr. Brown, what do the records of Miller & Lux, Incorporated, show as to the holdings of stock therein by Mrs. J. Leroy Nickel?

A. 93¼ shares.

Q. And how many shares are owned by Mr. J. Leroy Nickel?

A. Thirty-five.

1429 Q. That record you are taking from the minute book of the company?

A. Yes.

Q. As appears at the stockholders' meeting held when?

A. Eighth of September, 1914.

Q. Now, when did Mrs. Nickel acquire those shares, as shown by the records?

A. Mrs. Nickel acquired them December 10, 1907.

1430 Q. Did Mr. and Mrs. Nickel acquire those holdings at the same time?

A. No.

Q. Then it was,—where did Mrs. Nickel acquire her stock?

A. From the Lux trustees.

Q. Mrs. Nickel's stock came from the Lux trustees,—do you know how?

A. Well, she was a niece of Mrs. Lux, and an heir by bequest.

1431 Q. And this was a bequest to her? From Mrs. Lux?

A. Yes.

Q. When did Mr. Nickel acquire his stock?

A. December 12, 1907.

Q. And all in one body?

A. Yes.

Q. In its entire holding?

A. Yes.

Q. From whom did he acquire his shares?

A. He bought it from his wife.

1432 Q. What was the amount of Mrs. Nickel's bequest,—that she acquired under her legacy from Mrs. Lux?

A. One hundred and seventy-three and a fraction.

Q. And how many shares did Mrs. Nickel give to Mr. Nickel on the 12th of December?

Mr. TREADWELL. He did not say she gave any.

A. Thirty-five were sold.

1433 Q. Did Mrs. Nickel give or sell them?

A. Sold them for a top price,—$65. a share.

Q. Did you know that personally?

A. I know it from the books and a debit to Mr. Nickel's account and credit to Mrs. Nickel's account.

Q. In the books?

A. In the books.

Q. Those books show the personal accounts of the stockholders as well as the corporation?

1434 A. Show the personal account of Henry Miller, J. Leroy Nickel and Mrs. Nickel.

Q. Individually?

A. Individually.

Q. All are kept on the books of Miller & Lux, Incorporated?

A. Yes.

Q. How long have those accounts been kept in the books?

A. I do not know; ever since the corporation was started, I suppose. J. Leroy Nickel

1435 certainly had an account. Mrs. Nickel's started a little later,—after her mother died, probably.

Q. Those accounts cover all the personal transactions of Mr. Nickel, or Mrs. Nickel, or do they just show those transactions which transactions which concern his interests in Miller & Lux?

A. No interest in Miller & Lux; cash accounts for personal disbursements, receipts and disbursements, personally.

1436 Q. Mr. Brown, the books show, and if you will kindly state, when the properties of Las Animas & San Joaquin Land Company, Incorporated, were transferred to Miller & Lux?

A. Most of them were transferred March 27, 1913.

Q. When were the balance,—within what period, say?

A. In April 17, 1913, except two small lots, —100 acres and about another acre.

1437 Q. Is there any other corporation with a name similar to the Las Animas & San Joaquin Land Company, Incorporated? Connected with the Miller & Lux interests?

A. Not since that corporation became defunct.

Q. And when did it become defunct?

A. On April 15, 1913,—no, hold on,—I am wrong. When Las Animas & San Joaquin Land Company, Incorporated, became defunct.

1438 Q. When did the Las Animas & San Joaquin Land Company, Incorporated, become defunct?

A. When the corporation absorbed the properties and failed to pay tax,—July 21, 1905.

Q. In other words, the first company of that general name was the Las Animas & San Joaquin Land Company?

A. Yes, sir.

Q. And the succeeding company was the Las Animas & San Joaquin Land Company, Incor-

1439 porated?

A. Yes, sir.

Q. And the Las Animas & San Joaquin Land Company lost its charter by reason of failure to pay its license tax about July, 1905?

A. Well, when the tax was due and became delinquent; I do not know the exact date when it became defunct.

Q. All the assets of that corporation were transferred to the Las Animas & San Joaquin

1440 Land Company, Incorporated?

A. I think so.

Q. Was that a California, or a corporation organized under the laws of some other state,—that is, I am referring to the corporation called the Las Animas & San Joaquin Land Company, Incorporated?

A. A Nevada corporation.

Q. A Nevada corporation. What was the occasion, if you know, of the transfer of the assets from the first to the second company?

1441 A. I was never informed.

Q. Who are the stockholders of the Las Animas & San Joaquin Land Company, Incorporated? Did Miller & Lux own all of that stock, Mr. Brown, excepting the qualifying shares, nominally in the names of some directors?

A. Henry Miller owned it all at one time.

Q. Were they all issued to Mr. Miller?

A. All except the two for directors.

1442 Q. Qualifying shares?

A. Yes, qualifying shares.

Q. Now, when did the Las Animas & San Joaquin Land Company, Incorporated, go out of business?

A. 15th of April, 1913.

Q. What was the occasion of that?

A. Certificate of dissolution.

Q. And do you know the reason why that corporation was dissolved?

1443 A. The reasons were never told to me.

Q. What became of the assets of that corporation?

A. Went to Miller & Lux, Incorporated.

Q. And when was that transfer made, and, if at different times, please state, approximately, giving the assets conveyed at each time?

A. Las Animas & San Joaquin Land Company, Incorporated, on March 27, 1913, transferred its properties to Miller & Lux, Incorporated. I cannot answer the question without time to look into it.

1444 Q. Will you make a note of that and look it up?

A. Yes.

Q. Aside from Henry Miller and Mrs. and Mr. J. Leroy Nickel, and the directors, Mr. Anderson, Mr. Brown, Mr. Merritt, Mr. Mitchell, who were stockholders in Miller & Lux, Incorporated at the time of Mr. Miller's death?

A. J. Leroy Nickel and Mrs. Nickel, trustees.

Q. That represents the Henry Miller stock,

1445 doesn't it?

A. Yes.

Q. Aside from that, who were stockholders?

A. There were none, I believe.

Q. None other. What consideration did the Las Animas & San Joaquin Land Company, Incorporated, receive from Miller & Lux, Incorporated, for the transfer of all of its properties to Miller & Lux, Incorporated?

A. A certain number of bonds.

1446 Q. Bonds of Miller & Lux, Incorporated?

A. Yes.

Q. Didn't the Las Animas & San Joaquin Land Company, Incorporated, deliver those bonds to the Lux heirs?

A. Not all of them.

Q. In exchange for,—not all of them. How many of them were not so delivered?

A. I cannot remember all of these things. I think four and a half million. It was years ago, —it is impossible for anyone, with no particular

1447 interest to remember. I will take the question and report next time.

Q. I thought this statement (indicating statement) would show. Miller & Lux, Incorporated, has a bond indebtedness of five million, Mr. Brown?

A. Yes.

Q. That bond indebtedness is all outstanding?

A. Yes.

1448 Q. None of the bonds have been retired?

A. None retired.

Q. If any bonds were not disposed of to the Lux heirs, they were sold for cash by Miller & Lux, Incorporated?

A. Yes.

Q. And the cash proceeds turned into the treasury of the corporation?

A. Yes.

Q. The result of these measures taken in

1449 connection with the assets of the Las Animas & San Joaquin Land Company, Incorporated, was to discontinue that corporation, to transfer all of its assets to Miller & Lux, Incorporated, to assist in the creation of a bond issue, used as you have described,—is that correct?

A. I believe so.

Q. And either in assets or money the full values of all of the holdings of that corporation,—Las Animas & San Joaquin Land Company, Incorporated, are now represented either by stock or bonds in Miller & Lux, Incorporated?

1450 A. Yes.

Q. Referring now to the Antelope Valley Land & Cattle Co., Miller & Lux, Incorporated, owned 3066 shares out of a total authorized issue of 10,000,—is that correct?

A. Yes, on information and belief, if that says so; I do not know anything about it; yes.

Q. Is the control of that corporation in the hands of Messrs. Moffitt & Humphrey?

A. The Antelope Valley,—I do not know any-
1451 thing about it; I suppose it is.

Cross-Examination.

Mr. Treadwell. Q. Mr. Brown, you were asked to examine the records and see what provision, if any, had been made as to who was general manager of the corporation of Miller & Lux, Incorporated,—what did you find?

A. I found that the by-laws provide that the president shall be general manager; if the presi-
1452 dent is unable to act the vice-president shall perform all his duties.

Q. Now, you were familiar in a general way with the issue of the bond issue of five million dollars by Miller & Lux, Incorporated, were you not?

A. Yes.

Q. You remember, do you not, that certain properties of the Las Animas & San Joaquin Land Company, Incorporated, were taken over by Miller & Lux, Incorporated, at that time?

1453 A. Yes.

Q. And bonds issued for it?

A. Yes.

Q. Do you remember about when that bond issue was made?

A. 1910.

Q. About 1910,—so that part of the Las Animas & San Joaquin Land Company, Incorporated, was taken over at that time and the balance at a later date?

1454 A. Yes.

Q. Now, at that time was the corporation of Miller & Lux, Incorporated, indebted in a large sum of money to the Las Animas & San Joaquin Land Company?

A. Yes.

Q. That formerly it had been an indebtedness to Henry Miller?

A. Yes.

Q. Was it a fact that that indebtedness was also cancelled and bonds issued for it; is that

1455 your recollection?

A. My recollection is that the indebtedness was cancelled as part of the agreement of taking over the bonds.

Q. In consideration the bonds that were issued to the Las Animas & San Joaquin Land Company was partly property taken over and partly the outstanding indebtedness?

A. Yes.

Q. Now, you are somewhat familiar with that, —as to how it occurred and accrued?

1456 A. In a way, yes.

Q. At any rate, Henry Miller, and later the Las Animas & San Joaquin Land Company, which he formed, was, of course, always the majority stockholder of Miller & Lux?

A. Yes.

Q. During the years when the Lux heirs owned something like one-half and he owned the other half, is it a fact that instead of using and withdrawing the dividends which he was entitled
1457 to, the corporation simply paid dividends to the German heirs and his dividends were allowed to accumulate?

A. Yes.

Q. In other words, he lent the money back to that corporation in that way?

A. Yes.

Q. By the German heirs, we refer to the Lux heirs.

A. Yes, I understand.

1458 Q. So that during that period the dividends were declared in order to satisfy the requirements of the German heirs?

A. Yes.

Q. And if the corporation was not able to pay them, as far as Mr. Miller was concerned, he did not draw the dividends, and he held back and accumulated an indebtedness in his favor?

A. Yes.

Q. And that indebtedness remained, and at the time the bonds were issued,—they were is-

1459 sued for the indebtedness, is that correct,—to a certain extent?

A. To a certain extent,—yes. There were large rents coming in.

Q. In other words, Mr. Miller was also in receipt of a salary?

A. In receipt of a salary.

Q. That was charged against the corporation?

A. It was.

Q. And during that period there was also
1460 real estate which Mr. Miller owned personally, which he rented to the corporation of Miller & Lux, Incorporated,—is that correct?

A. Yes,—when Las Animas was formed.

Q. So far as Las Animas, Incorporated, was concerned, it was simply Henry Miller?

A. Yes.

Q. His personal estate, in his own name?

A. Yes.

Q. At any rate, considerable of the property
1461 he did own he did rent to Miller & Lux, Incorporated, and rents accrued to him in that way?

A. Yes.

Q. So that the bonded indebtedness that was created was not all created for property received by Miller & Lux, Incorporated, at the time of its creation, but to a certain extent was created for the payment of that indebtedness which was then wiped out?

A. Yes.

1462 Q. You have not in mind the exact amount of that indebtedness that was wiped out at the time of that bond issue, have you?

A. I would not like to say; I have a general idea in my mind, it was a million or two.

Q. Now, you stated that in 1907 Mrs. Nickel sold to her husband, J. Leroy Nickel, 35 shares of Miller & Lux, Incorporated, at $65. a share?

A. Yes.

Q. And you stated that was the top price?

1463 A. Yes.

Q. Do you mean that you were familiar with the price at which stock of Miller & Lux, Incorporated, had sold at up to that time?

A. Yes.

Q. And up to that time that was the highest price you know for that corporate stock to be paid?

A. Yes.

Mr. TREADWELL. That is all.

1464 Mr. PEART. That is all, Mr. Brown.

Witness excused.

Wednesday, January 3, 1917.

No. 304 Humboldt Bank Building,

San Francisco, California.

2:00 o'clock P. M.

The hearing before Inheritance Tax Appraiser R. F. Mogan, in the matter of the estate of Henry Miller, deceased, continued from Decem-

1465 ber 13, 1916, was held at the above time and place.

Appearing for the State of California and John S. Chambers, state controller,

William A. Sullivan, assistant inheritance tax attorney, and Hartley F. Peart, special counsel for state controller.

Appearing for the executors and trustees of the estate of Henry Miller, deceased, and as personal representative of Mrs. Nellie Miller Nickel

1466 and J. Leroy Nickel,

Edward F. Treadwell.

Thereupon the State of California called

MARGARET M. THOMAS,

who being duly sworn, testified as follows:

MR. PEART. Q. Miss Thomas, what is your full name, please?

A. Margaret M. Thomas.

Q. Where do you reside?

A. 18 Vicksburg street.

1467 Q. San Francisco, California?

A. Yes.

Q. How long have you resided here?

A. I was born here.

Q. You have resided here ever since?

A. Yes.

Q. How long have you been in the employ of Miller & Lux?

A. Ten years.

Q. Are you still in the employ of Miller & Lux?

1468 A. Yes.

Q. Your duties there are what?

A. Stenographer.

Q. Did you take dictation from the late Henry Miller?

A. Yes.

Q. From about what time?

A. From October 1, 1906, until May 29, 1914.

Q. You were the stenographer in the office to whom Mr. Miller always dictated?

1469 A. Yes.

Q. Did he dictate to anyone else?

A. When I was on my vacations.

Q. And that would be all?

A. Yes.

Q. Was he accustomed to dictating to you daily from 1906 up to 1910?

A. Yes. When he was in town.

Q. That would be when he was in town?

A. Yes.

1470 Q. He was absent from San Francisco a great deal, was he not?

A. Sometimes a couple of days,—a week or so.

Q. In October, 1910, Mr. Miller was taken ill,—do you recall that?

A. Yes.

Q. How long after that illness, or the commencement of that illness was it that Mr. Miller first sent for you to take dictation?

A. The next day,—he came home from the country, he sent for me the next day.

1471 Q. And you went out to the residence on Laguna street to take dictation?

A. Yes.

Q. And how long did you continue taking dictation daily from Mr. Miller?

A. Until May, 1914.

Q. How long would Mr. Miller dictate on those occasions when you called at the residence?

A. About an hour, and an hour and a half,—I just remined part of the morning.

1472 Q. About what time did you get out there?

A. About ten,—I remained until noon, sometimes later.

Q. Have you with you the copies of the letters which he dictated during that period?

A. Yes, they are outside.

Witness here produced five letter files, marked "Henry Miller copies," respectively, as follows: "Oct. 28, 1910, to Dec. 31, 1910; from January, 1911, to August, 1911; Sept., 1911, to Dec., 1911;

1473 January, 1912, to December, 1912; January, 1913, to May, 1914."

Same were introduced in evidence and marked:

"Petitioner's Exhibit A" (Oct., 1910, to Dec., 1910);

"Petitioner's Exhibit B" (Jan., 1911, to Aug., 1911);

"Petitioner's Exhibit C" (Sept., 1911, to Dec., 1911);

"Petitioner's Exhibit D" (Jan., 1912, to Dec., 1912);

1474 "Petitioner's Exhibit E" (Jan., 1913, to May, 1914)."

Q. What do these files contain, Miss Thomas?

A. Letters dictated by Mr. Miller.

Q. The carbon copies?

A. The carbon copies.

Q. Do they contain any replies?

A. No.

Q. They consist exclusively of carbon copies of letters dictated during this period indicated
1475 by the endorsement on the back of each of the letter files?

A. Yes.

Q. And they are the complete files of all letters dictated by Mr. Miller during that period?

A. Yes.

Q. There are no other letters which he dictated, which are not included here?

A. No.

Q. Would there be occasions, Miss Thomas,
1476 when Mr. Miller would dictate at less intervals of times than others?

A. Yes, there were days when I did not go out there.

Q. Would there be days when he did not dictate to you at all?

A. Very few; days when he did not feel very well, I would read to him.

Q. What would you read to him?

A. Mail that I took out there.

Q. Mail from the office?

A. Yes.

1477 Q. Did you always take mail from the office?

A. Yes.

Q. And that continued up to the time you stopped taking dictation from him?

A. Yes.

Q. How would you determine what mail to take to him?

A. That was handed to me.

Q. Who handed it to you?

A. Mr. Nickel.

1478 Q. The mail that you took out there represented all the mail that came to the office?

A. Yes, all of interest to Mr. Miller.

Q. Where was the mail opened,—by Mr. Nickel at the office?

A. By a clerk there.

Q. By a clerk?

A. Yes.

Q. And he determined what mail should be brought out to Mr. Miller by you?

1479 A. Yes.

Q. Were there times when Mr. Miller would try and fail to answer all the mail that you brought out?

A. If he did not feel very well he just had me read it to him and answered it the next day.

Q. How often would that occur?

A. Not very often; he always dictated quite a bit.

Q. Was Mr. Campbell, the nurse, in attendance at the time that Mr. Miller was dictating?

A. He was never in the room.

1480 Q. He would be in an adjoining room, within call?

A. Yes.

Q. Did he determine how long Mr. Miller should dictate?

A. No.

Q. Did he ever say to you,—did Mr. Campbell give you instructions as to how long you should remain?

A. No.

1481 Q. Mr. Miller determined that himself?

A. Yes.

Q. What position would Mr. Miller occupy while dictating,—would he be seated in a chair?

A. Yes.

Q. I understand there were a number of invalid chairs of different kinds in the room,—reclining chairs, easy chairs,—did Mr. Miller use those different chairs?

A. He always sat in one chair.

1482 Q. One particular chair?

A. Yes.

Q. When he was dictating would he get up and walk about the room?

A. No.

Q. He remained seated?

A. Yes.

Q. Who gave you the instructions to cease going out to the house, Miss Thomas, in May, 1914?

A. Well, he used to telephone for me every morning.

1483 Q. I think you did not understand the question,—who told you not to come,—you simply failed to come because he did not telephone for you to come?

A. I was always supposed to go when he telephoned in the morning.

Q. You mean someone in the house telephoned?

A. He had them telephone.

Q. Did he ever discuss matters connected with
1484 Miller & Lux with you, aside from the dictation?

A. No.

Q. He never discussed any affairs with you at all, except the contents of these letters and replies?

A. No.

Q. He never engaged in any conversation at all outside of your business duties as stenographer?

1485 A. No.

Q. That is all.

Cross-Examination.

Mr. Treadwell. Q. What part of the house did you generally take dictation in, Miss Thomas?

A. For a while he used to dictate down stairs, —later on up stairs.

Q. That was before the house was remodeled, —you used the sitting room in the back, up stairs?

1486 A. Yes, sir.

Mr. Treadwell. That is all.

Mr. Peart. That is all, Miss Thomas.

Witness thereupon excused.

Joseph J. Lane

called by the State of California, sworn, testified as follows:

1487 Mr. Peart. What is your full name, please?

A. Joseph J. Lane.

Q. And your residence?

A. 1484 Noe Street.

Q. San Francisco, California?

A. Yes.

Q. And your business or occupation?

A. Nurse.

Q. How long have you been a nurse?

A. Since 1889.

1488 Q. Did you prepare for that occupation anywhere?

A. Yes, sir; the Waldeck; the Waldeck Sanitarium.

Q. Waldeck Sanitarium, this city?

A. Yes, sir.

Q. Waldeck Sanitarium——

A. Under Dr. Herzstein.

Q. How many years did you spend in preparation there?

A. Two years.

1489 Q. When did you first become acquainted with the late Henry Miller?

A. On October 27, 1910, I think that is the date.

Q. And how long did you know Mr. Miller?

A. That was the first time I ever met him; I saw him a few months before that; previous to that I never saw him.

Q. Did you remain with him up to the time of his death?

1490 A. I was with him up to the time he died,—except one month when I had a vacation.

Q. You attended him in your capacity as nurse?

A. Yes, sir.

Q. By whom were you employed, Mr. Lane?

A. I was employed by Mrs. Nickel, his daughter; she sent for me when he got sick.

Q. Your hours of duty during the time you attended Mr. Miller as a nurse were what, Mr.

1491 Lane?

A. From seven at night until seven or eight in the morning; I was on night duty,—come on at seven in the evening.

Q. And the place where you attended him was where?

A. It was his bedroom; sometimes I took him downstairs for breakfast; for quite a while he had breakfast downstairs, until a few months, when the sitting room was built he had breakfast there.

1492 Q. On Laguna Street, San Francisco?

A. Yes, sir.

Q. And you attended him at Laguna Street entirely, except on the occasion of a trip or two into the country?

A. Yes.

Q. Can you tell us approximately when those trips took place?

A. Now, that's the trouble,—I can't remember. We took two trips to Gilroy and Mount
1493 Madonna, and went to Arrowhead, and remained about a month,—over two years ago, I know.

Q. Except for the occasion of the two trips to Gilroy and one to Arrowhead, you were in attendance here at San Francisco, at the Laguna Street home?

A. Yes.

Q. Did you on these two trips to Gilroy, and at Arrowhead, attend Mr. Miller the same hours
1494 that you did in San Francisco?

A. Just the same hours,—the hours were always the same.

Q. Mr. Campbell, the day nurse, attended him from seven in the morning until seven in the evening, and you attended him the remaining hours out of the twenty-four?

A. Yes, sir.

Q. Your own living apartments were where during this time?

A. I live home with my wife.

1495 Q. In San Francisco?

A. Yes, I have my own home here.

Q. At the address you have given?

A. Not always at that address; I have only been there a little over a year.

Q. You would come on duty at seven in the evening and remain until seven or eight in the morning?

A. Sometimes eight, and sometimes later. Mr. Miller requested me to remain until he got
1496 dressed—wanted to have me dress him in the morning.

Q. During this time Mr. Miller was attended by Dr. Herzstein, we have been advised.

A. Yes.

Q. Would the doctor make his calls in the evening?

A. Sometimes in the evening, sometimes in the early morning; you never know when he comes; he often came while I was on duty.

1497 Q. He visited him daily, according to Mr. Campbell.

A. Yes.

Q. You were in attendance on Mr. Miller from the latter part of October, 1910, until the time of his death?

A. Yes.

Q. Who succeeded Mr. Campbell?

A. A man by the name of Guthrie.

Q. Yes,—do you know his initials?

1498 A. I don't believe I do; he was there four weeks,—not quite four weeks.

Q. He is also a nurse?

A. Also a nurse.

Q. Now, what was Mr. Miller's hour for retiring?

A. Well, I don't know; he retired at night about eight o'clock.

Q. Was he already in bed when you came on duty?

1499 A. No, I came on duty at seven.

Q. It was part of your duty to prepare him for bed?

A. Yes, that is right,—he always had me undress him.

Q. Would you undress him?

A. I would assist him to undress,—I took him in his room, I would take his coat and vest off, and sit him on the edge of the bed and take off his shoes and trousers, and put on his pa-

1500 jamas, and put him in bed,—put the hot water bottle at his feet,—I usually gave him some pills at night for his liver, if he did not receive any bromial.

Q. Mr. Campbell mentioned suppositories.

A. Yes, I gave him suppositories during the last three years he was taking suppositories.

Q. How often?

A. Every night,—they helped him to rest,—he had a very active brain, and would go to bed at night thinking about business affairs, and

1501 could not sleep, and I would give him the suppositories in order that he would have a good night.

Q. What was the composition of the suppositories?

A. Two grains of opium, fifteen grains of bromial.

Q. After he was in bed, and with a hot water bottle, as you have described, or hot water bag, where would you go?

1502 A. I was in the same room,—there was a couch on the opposite side of the room, and he always insisted on me laying down, saying "I will call you" he always called me, I used to rest very lightly and heard him when he turned over.

Q. In the morning, about what time would he awake, as a rule?

A. Sometimes he was quite wakeful, and insisted upon getting up very early,—as early as 1503 six o'clock, as a rule he was always dressed around seven or half past; some mornings he would not rest well, he stayed in bed later. I would remain until Mr. Campbell would bring his breakfast up, somewhere around about half past seven, then I went off duty.

Q. Would you dress him in the morning?

A. I would assist him to dress.

Q. Well, just describe how you assisted him.

A. Well, for quite a while he insisted,—he walked into the bathroom,—he used to take a

1504 sponge bath at the wash stand,—he kept doing that for quite a while. I would dry him off, put on his underwear, dress him, put on his shoes. I would take him downstairs when he went down.

Q. Would you assist him on with his shirts?

A. Oh, yes.

Q. You put the buttons in the shirt?

A. I held the shirt, but he wanted to help himself a great deal.

1505 Q. He always tried to help himself a great deal?

A. Always; he was a man that—he was satisfied with very little.

Q. When he put on his trousers he would sit down on the bed and put them on in that way?

A. Yes.

Q. Could he tie his own tie,—or did he wear a tie?

A. That is one thing he never did,—tie his

1506 own tie; he always had somebody tie it for him; he wore a bow tie and he had somebody get it around his collar for him.

Q. How long would it take him to get dressed?

A. I would get him dressed in about twenty minutes; he did not take very long.

Q. Mr. Campbell told us there were two or three reclining chairs in the room there,—invalid chairs, I think you call them.

A. More like a steamer chair, people use on board ship, or porches in the country.

1507 Q. There were two or three of them?

A. One—two—I know there was one couch.

Q. And after you dressed him—in the early part of the time you were there he would go downstairs to breakfast?

A. He would go down before seven in the morning.

Q. Alone, or with assistance?

A. He used to walk, I used to take his arm,—he would shake me off, he did not want my arm

1508 to the elevator.

Q. Would you be with him in the elevator?

A. Yes, we would operate the elevator ourselves.

Q. He disliked the idea of your assisting him?

A. Yes, he often expressed the idea he could get along with one man, he did not see why he should have two, for a number of years.

Q. Your instructions were to be with him

1509 constantly?

A. Yes.

Q. Who gave you those instructions?

A. The doctor and Mrs. Nickel.

Q. Do you recall the doctor's calling in any other doctors in consultation at different times?

A. Yes, I saw them at various times.

Q. Can you give us their names?

A. Dr. Thorne, was there once,—he is dead now; Dr. Moffitt was there——

Q. At time when you were on duty?

1510 A. As a rule they came in the day time when I was not there but I knew they had been there.

Q. That would be during those period that Mr. Campbell has described as bad spells?

A. Yes.

Q. How did those bad spells appear to you,—what evidence of them would you note?

A. Very often he had a bad spell because he ate something that would not agree with him, and he would have an accumulation of gas, and

1511 he would suffer with a little pressure for a couple of days, but that would pass away all right.

Q. Did you give him any medicine for his kidneys?

A. Kidneys,—no particular medicine until the last four months or so; his kidneys always acted very well.

Q. Mr. Campbell told us that you gave him strychnine,—or was strychnine given him for his

1512 heart?

A. Oh, yes, occasionally strychnine was given him for the heart.

Q. Do you recall any quantity of strychnine given him?

A. Generally a fortieth of a grain.

Q. And Mr. Campbell told us that strychnine was administered from one to three times a day,—is that about right?

A. That is about right.

1513 Q. Nitro-glycerine was administered from once to twice a day, Mr. Campbell stated,—is that right?

A. Lots of times he did not get any nitro-glycerine; he used to get that occasionally.

Q. What was that for?

A. Heart stimulant,—stimulates breathing.

Q. Strychnine was also for the heart?

A. Yes.

Q. Now, Mr. Campbell testified that he was
1514 sometimes given rhubarb pills?

A. Yes, that is right; he had various pills, all for the same purposes.

Q. And that he sometimes was given Hunyadi?

A. Yes.

Q. For the bowels?

A. Yes.

Q. And some saline solutions of various kinds?

1515 A. Yes.

Q. Do you recall trouble with his circulation?

A. One time, some years ago he had stoppage of blood vessels in the leg,—it only lasted for a few days.

Q. At times you had to massage his legs,—one of them,—for bad circulation?

A. No, circulation bothered him very little; his general circulation was good. That trouble with his leg was over in a few days, merely stopping of a vessel, and he was a man who

1516 never wanted anyone to massage him; said he did not think it was necessary.

Q. Mr. Campbell described to us that one complaint was acute indigestion accompanied by acute vomiting,—do you recall that?

A. Yes.

Q. He did not have those attacks often, did he?

A. Not very often; seldom; if Campbell gave him something that disagreed with his stomach.

1517 Q. Now, as to his lungs,—he was troubled with bronchial affection,—was he not troubled with respiration?

A. His respiration was usually all right, except when he would get cold, it affected his throat, an accumulation of mucus in his throat,—he was clearing his throat a great deal.

Q. On those occasions—there were occasions when you used oxygen?

A. Yes, we used oxygen when he had trouble

1518 with his throat, it helps the mucus in the throat.

Q. Did you have tanks of oxygen at the house?

A. Yes, we usually kept them at the house.

Q. How was it administered?

A. It was administered through a wash bottle and through a tube, holding it to his nose or mouth.

Q. In other words, you would pass oxygen through water?

A. Yes, that's the idea.

1519 Q. How often would you administer oxygen that way?

A. Not often; he often went months without having oxygen at all. A great many men use oxygen. I used it with Mr. Lent a great deal—Eugene Lent's father—he used it for years,—it is considered a good stimulant. Few people can afford to have it.

Q. You never accompanied Mr. Miller around the city in the automobile rides—that would be
1520 at times when you were off duty?

A. I very seldom did; there were a few times, though, during the Exposition that I used to,—Campbell would get a day during the week, and I would stay in his place and we would go to the park and beach.

Q. Occasionally you would go?

A. Just a few times,—not very often; just since the exposition it was that Mr. Campbell was in the habit of getting a day off once a week.

1521 Q. When you did accompany Mr. Miller in the limousine were there occasions when he would leave the machine anywhere?

A. I think about twice we went into the Cliff House and had a cup of coffee or cocoa, and would sit there for half an hour and then come home.

Q. Some member of the family, Miss Nickel or Mrs. Nickel, would accompany him?

A. Mrs. Nickel very often; when she did not Miss Jensen would come.

1522 Q. On a couple of occasions Mr. Miller got out and went into the Cliff House and had tea?

A. Either coffee or cocoa.

Q. Did you go in also and have refreshments?

A. Yes, I usually had a cup of coffee.

Q. There were times, according to Mr. Campbell, when Mr. Miller suffered more or less from either kidney or bladder trouble, and required to go to the toilet frequently.

1523 A. Simply nervousness. Mr. Nickel would come home and tell him something he had seen on one of the ranches and he would get nervous; then when a man gets nervous it always affects his kidneys badly.

Q. Worrying on different occasions about business matters would affect Mr. Miller in that manner?

A. Yes, whenever he heard anything that worried him,—it was purely nervousness, that is
1524 all,—no physical condition at all,—his bladder or kidney were always good. It was nervous trouble.

Q. Did you keep a chart, Mr. Lane, of Mr. Miller's condition during your hours on duty?

A. Yes, sir.

Q. One chart was kept there, and you made your entries on the chart and Mr. Campbell made his during his hours?

A. Yes, sir.

1525 Q. What were your instructions to note on that chart?

A. Well, the hours of sleep, each time Mr. Miller would get up during the night, if he rested good, and I generally recorded the time I dressed him in the morning, and when I took him into the sitting room, he usually took the morning papers and read.

Q. You kept that chart under the doctor's instructions?

1526 A. Yes, sir.

Q. Did you keep his temperature?

A. Occasionally when he had an attack, had a cold, but as a rule we did not because when we wanted to take his temperature he wanted to read to the papers, and we found it was not necessary, only when he had a cold,—in case he had fever or anything.

Q. What would Mr. Miller do from the time you came on duty until you put him to bed at

1527 eight?

A. He probably spent half an hour with his daughter,—sometimes Mr. Nickel—between seven and eight he usually had conversation with some member of the family before I put him to bed.

Q. Did he ever discuss his affairs or the affairs of Miller & Lux with you?

A. No, not as a rule.

Q. Well, did he ever at any time discuss them with you?

1528 A. How hard he worked as a boy,—how he would get up early in the morning.

Q. Did he refer to his early life at all, when he was young and did not have anything?

A. Well, no, he never did mention that to me.

Q. He simply said how hard he had worked?

A. Getting up and riding around the ranches, and different things.

Q. Did he discuss the different ranches that he owned?

1529 A. Not with me; no, sir.

Q. Did you ever hear him discuss them with anybody else?

A. I never paid any attention to any conversations.

Q. When anybody came to see him?

A. I retired and he would call me when they finished. If I was in the sitting room I would take up the paper and read, and I was only in the room when they called me.

1530 Q. If you were in the sitting room, they would be in the bedroom; and if they were in the sitting room, you would go in the bedroom,—as the case might be?

A. Yes, sir.

Q. You would be in the adjoining room?

A. Yes, sir.

Q. Did he ever discuss with you the making of a deed of trust?

A. He never mentioned it to me.

Q. The deed of trust made April 8, 1913?

1531 A. He never mentioned it to me.

Q. Did he ever mention a will to you?

A. Never mentioned it to me.

Q. Did he ever mention the disposal of his property to you?

A. Never.

Q. And aside from his comment how hard he used to work, riding over his ranches as a young man, he did not talk of his affairs?

A. No, sir.

1532 Q. Did he ever discuss in your presence, or say anything to you about the management of the affairs of Miller & Lux?

A. No, sir.

Q. Did he ever discuss with you the correspondence Miss Thomas brought up to the house,—letters,—and his replies to them?

A. No, sir.

Q. Now, in the morning, any time from six to eight, you would dress Mr. Miller when he

1533 got up?

A. Yes, sir.

Q. And then his breakfast would be brought up by Mr. Campbell?

A. Yes, sir.

Q. And you would then go for the day?

A. Yes, sir; I would go for the day.

Q. How often did these bad spells occur, from October, 1910, up to the time of his death, can you recall?

1534 A. Well, not very frequently. 1910 he was taken down with a very severe attack of gout, and he had a recurrence once in a while,—his principal trouble was gout.

Q. Most annoying?

A. Most annoying. He was not at any time seriously ill until about four months before he died.

Q. Do you recall when the elevator was installed?

1535 A. No, I could not say when it was installed. I know it had been there for over a year, I could not tell how long.

Q. Did you have instructions from the doctor to keep the temperature of his room at a certain point?

A. Only when he had colds the doctor would say keep the room at a certain temperature.

Q. What were the arrangements in reference to heating the house?

1536 A. Electricity; electric heaters; there was a furnace in the basement.

Q. Hot air?

A. Usually kept the temperature up with electric heat,—we could not depend on the furnace.

Q. Did you ever see Mr. Miller reading legal papers, or what had the appearance of legal papers?

A. No, I never did. He usually read the morning papers and evening papers when I was

1537 there; pretty nearly all the papers, morning papers and evening papers.

Q. Chronicle, Examiner, Call, Bulletin?

A. Yes, he usually read the Call in the evening and the Examiner in the morning.

Q. And Town Talk, News Letter and Wasp?

A. Town Talk, News Letter and the Argonaut.

Q. He liked Town Talk?

A. Very much. The Wasp he did not read

1538 very much.

Q. Would you follow the same course of living, the same duties, etc., on the two trips to Gilroy and the trip to Arrowhead?

A. Just about the same.

Q. The routine was followed just the same?

A. Just the same.

Q. On the trips to Gilroy did Mr. Miller go there by train?

A. Always went by train.

1539 Q. Went by automobile to Third and Townsend, then by train and was met by automobile?

A. At Gilroy.

Q. You went out to Mount Madonna.

A. Twice I think we went to Mount Madonna.

Q. Did you still remain on night duty at Mount Madonna?

A. Yes, sir.

Q. You never went along in the day time?

1540 A. I would get up in the afternoon and go riding, I used to take advantage of that; I went with Campbell but not in the capacity of nurse; just for recreation.

Q. Mr. Campbell testified that Mr. Miller never got out of the machine on those trips,—do you recall whether he did or not?

A. I don't remember.

Q. Do you recall meeting or talking with anyone at Mount Madonna?

1541 A. No, not that I know of, except his employees.

Q. Except his employees. Did he see superintendents and foremen?

A. He always talked with the superintendent.

Q. Who was superintendent there at the time?

A. The chief man at Mount Madonna was Marquart, and then down at Gilroy Mr. Barney, —Mr. Johnson, I think, I don't remember his name.

1542 Q. Do you recall his talking with Mr. Barney?

A. I was never within hearing.

Q. Do you recall his talking with Mr. Marquart?

A. No, sir.

Q. Did he talk with either foreman at Mount Madonna?

A. Just spoke about the cattle; he never talked much.

1543 Q. Can you recall his ever talking with either in your presence?

A. Not in my presence.

Q. You do not know whether he talked with either one?

A. I often saw him speaking.

Q. You would not be close enough?

A. I would not be close enough.

Q. Did Mr. Miller use a cane?

A. Yes, he usually used a cane, and very often
1544 he would go out and forget it, and would ask for it, it would be in the next room.

Q. Do you recall any other form of medication which was given Mr. Miller, other than those I have mentioned?

A. No, no other form.

Q. What?

A. No, no other form.

Q. Were visitors ever allowed to see him after you came on duty?

1545 A. He never had any visitors in the evening.

Q. None at all?

A. No.

Q. Did you know of any visitors who came to the house while you were acting as nurse for Mr. Miller?

A. Not during my time,—not during my hours.

Q. When you happened to be around, after finishing your sleep in the afternoon?

1546 A. Well, I never used to be there in the afternoon; I used to go home.

Q. You do not know of any visitors, other than doctors?

A. No, sir, I never knew what took place in the day time.

Cross-Examination.

Mr. Treadwell. Q. As I understand it, Mr. Lane, you had a bed or couch where you could sleep during the night, could you?

1547 A. Yes, sir.

Q. And you are trained so that you can sleep, but if the patient wants anything you know?

A. The minute he woke up he knocked, but I was usually awake by the time he called.

Q. You did sleep a good deal?

A. Sometimes I got a good deal of sleep during the night time.

Q. Do you know the immediate cause of Mr.

1548 Miller's death?

A. I believe congestion of the lungs and old age.

Q. I think that is all.

Redirect Examination.

Mr. Peart. Q. Congestion of the lungs or dilation of the heart are the immediate cause of nearly every death,—that is a fact, is it not?

A. Yes, sir; that was old age.

Q. That is all, Mr. Lane.

Witness was thereupon excused.

1549 Monday, March 5, 1917.

No. 304 Humboldt Bank Building

San Francisco, California

2:00 o'clock P. M.

The hearing before Inheritance Tax Appraiser R. F. Mogan, in the matter of the estate of Henry Miller, deceased, continued from January 3, 1917, was held at the above time and place.

Appearing for the State of Cali-
1550 fornia and John S. Chambers, State Controller,

Hartley F. Peart,

Special Counsel for Controller.

Appearing for the executors and trustees of the estate of Henry Miller, deceased, and as personal representative of Mrs. Nellie Miller Nickel and J. Leroy Nickel,

Edw. F. Treadwell.

1551 Appearing for the Department of Internal Revenue, Northern District of California,

P. H. Wood.

Thereupon the State of California and said State Controller called as a witness

DAVID BROWN,

who having been heretofore sworn, testified as follows:

1552 Mr. PEART. Q. Mr. Brown, referring to the ages and birthdays of certain parties in interest in this matter,—I will direct your attention first to Mr. J. Leroy Nickel,—his age, I believe is 65, and he was born January 25, 1851,—is that correct?

A. Yes; January 25, 1851.

Q. Born January 25, 1851?

A. Yes.

Q. And his age is over 60 years——

1553 Mr. TREADWELL. Sixty-six, the nearest birthday.

Mr. PEART. Yes. Mrs. J. Leroy Nickel is aged 51 years, and was born August 13, 1865,—is that correct?

A. Yes.

Q. Mr. George Wilmath Nickel, son of Mr. and Mrs. J. Leroy Nickel is aged thirty, and was born in February, 1887?

A. Yes.

1554 Q. What day?

A. Thirty; I believe February 2, 1887.

Mr. TREADWELL. Wouldn't that make him thirty?

Mr. PEART. Yes. Beatrice Sarah Nickel, daughter of Mr. and Mrs. J. Leroy Nickel, is of what age?

A. Twenty-four.

Q. And she was born when?

A December 5, 1893.

1555 Q. J. Leroy Nickel, Jr., son of Mr. and Mrs. J. Leroy Nickel, is what age?

A. Twenty-one.

Q. And he was born, when?

A. May 21, 1895.

Q. Sarah Miller Nickel, daughter of Mr. and Mrs. George Wilmath Nickel, was born on what day?

A. I don't know; she is a year old.

Q. Mrs. Nickel testified she was eleven
1556 months old at the time of the beginning of Mrs. Nickel's testimony; you have no record of her birthday?

A. No, sir.

Q. In Mr. Nickel's testimony (Vol. II of this record, at page 26), Mr. Nickel testified that he had full power of attorney to do everything, from Mr. Henry Miller, and the request was made that Mr. Nickel furnish us with the power of attorney; have you it here, Mr. Brown?

1557 A. I have it here. (Hands document to Mr. Peart.)

Q. We will introduce this power of attorney from Henry Miller to J. Leroy Nickel, dated February 14, 1911, witnessed by E. Frank Campbell as subscribing witness before M. V. Collins, Notary Public in and for the city and county of San Francisco, State of California, endorsed as recorded at "request of Miller & Lux, Incorporated, January 13, 1916, in Book D of

1558 Powers of Attorney, page 165, Monterey County Records".

Mr. Treadwell. Will you stipulate, Mr. Peart, that it may be copied into the record and original withdrawn?

Mr. Peart. Yes.

Appraiser. Petitioner's Exhibit "F."

Mr. Peart. You are familiar, Mr. Brown, with the signature of Henry Miller,—is that his signature, to the power of attorney?

1559 A. It looks very much like it.

Q. You are familiar with the signature?

A. Yes.

Q. You have seen it many times?

A. Yes.

Q. In his lifetime?

A. Yes.

Q. You say it looks like it; was that his usual signature, as you are familiar with it?

A. No, not quite.

1560 Q. What are those marks to the left of it,—do you know?

A. No, I do not.

Q. It looks like the attempts of Mr. Miller to sign.

A. It looks like something was the matter with the pen.

Q. Shows rather an infirm hand on the part of Mr. Miller?

A. At that time,—yes.

1561 Q. Mr. Brown, in the deed of trust made by Henry Miller, April 17, 1913, to Nellie Miller Nickel and J. Leroy Nickel as trustees (Respondent's Exhibit No. 2), reference is made to Minnie Pfeiffer Sheldon, a niece of Henry Miller,—what is the age of Minnie Pfeiffer Sheldon, and what is her birthday?

A. Age fifty-seven; born September 7, 1859.

Q. Has Minnie Pfeiffer Sheldon any children?

A. She has.

1562 Q. And what are their names and ages and sex?

A. Josephine Sheldon Kickum, female, aged 27; Jeremiah Sheldon, male, aged 26; Mildred Sheldon Cornett, female, aged 24.

Q. Mention is also made in said trust deed of Sarah Long Brown, niece of Henry Miller; what is her age and birthday?

A. Aged 56; born June 6, 1860.

Q. Reference is also made to the children of

1563 the brothers and sisters of Sarah Long Brown; what brothers and sisters has she or had she?

A. She had a brother, Henry Long.

Q. Deceased?

A. No, alive.

Q. Alive?

A. Yes.

Q. And who are his children, if any?

A. Unmarried.

Mr. Treadwell. And no children.

Mr. Peart. No children?

1564 A. No.

Q. Did Sarah Long Brown have any sisters?

A. She had two sisters,—yes.

Q. And what are their names?

A. Elizabeth Long Barry and Nellie Long Whittington.

Q. Did Sarah Long Brown have any other brothers or sisters?

A. Albert Long, a brother,—dead.

Q. Did Albert Long die before the death of
1565 Henry Miller?

A. Yes.

Q. What children did he leave?

A. A son named David Long and a daughter named Mary Long.

Q. And what are the ages of those two children?

A. The boy, eighteen, and the girl, sixteen.

Q. Were both Mary Long and David Long alive at Henry Miller's death?

1566 A. Yes.

Q. Are they alive now?

A. They are.

Q. Elizabeth Long Barry's children are whom?

A. Frank Barry, aged thirty; George Barry, twenty-six; Hazel Barry, twenty-one.

Q. Are those three persons alive now?

A. They are.

Q. Nellie Whittington's,—Nellie Whittington had how many children, stating their ages.

1567 A. Two children,—two daughters, aged twenty-eight and Goldie Whittington, aged sixteen.

Q. Are both those persons alive now?

A. Yes.

Q. By the way, referring back just a moment, —are Josephine Sheldon Kickum and Mildred Sheldon Cornett now living?

A. They are.

Q. And is Minnie Pfeiffer Sheldon alive?

A. Yes.

1568 Q. Sarah Long Brown is alive?

A. Yes.

Q. What is Elizabeth Long Barry's age and her birthday?

A. Aged fifty-nine; born July 22, 1857.

Q. Elizabeth Long Barry was what relation to Henry Miller?

A. A niece.

Q. Who were the children of Elizabeth Long Barry, if any?

1569 A. Frank Barry, George Barry, Hazel Barry?

Q. What is Nellie Whittington's age and when was she born?

A. Aged forty-nine; born October 13, 1867.

Q. What is Henry Long's age and when was he born?

A. Aged fifty-four; born July 20, 1862.

Q. Is Albert Pfeiffer, brother of Minnie Pfeiffer Sheldon, alive?

A. No.

Q. When did he die?

1570 A. Before Henry Miller.

Q. Before Henry Miller died?

A. Yes.

Q. Has Martha Rembold any children?

A. Yes.

A. Albert Alexander Rembold, aged nineteen; Henry Gustave Rembold, aged seventeen; David Aaron Rembold, fifteen; Nathan Herman Rembold, aged thirteen.

Q. Is Martha Rembold the wife of Julius
1571 Rembold, a nephew of Henry Miller, as stated in the deed of trust?

A. A grand nephew.

Q. In other words, Julius Rembold is a grand nephew of Henry Miller?

A. Yes, I believe that is; I think he is a grand nephew.

Q. He is stated in the trust deed to be a nephew.

Mr. Treadwell. He is some kind of a nephew.

1572 A. Yes; the child of a daughter of a niece.

Q. Was Albert Pfeiffer a nephew of Henry Miller?

A. Yes.

Q. And is Minnie Pfeiffer Turner his daughter?

A. Yes.

Q. Did Albert Pfeiffer also have a son, Henry John Pfeiffer?

A. Yes.

Q. And another son, Albert Pfeiffer, Jr.?

1573 A. Yes.

Q. What is the age of Minnie Elizabeth Pfeiffer Turner, that is, at the time of Henry Miller's death?

A. Thirty.

Q. Henry John Pfeiffer?

A. Thirty.

Q. Albert Pfeiffer, Jr.?

A. Twenty-six.

Q. What is the age of Gustave Rembold
1574 Maas?

A. Twenty-five.

Q. And of Phillip Rembold Maas?

A. Twenty-three.

Q. What relationship did Gustave Rembold Maas and Phillip Rembold Maas sustain to Henry Miller?

A. Their mother was a grand niece.

Mr. Treadwell. A great grand niece?

A. Yes, a great grand niece.

1575 Q. What relation is Gustave Rembold to Henry Miller?

A. Grand nephew.

Q. What is his age?

A. Forty-six.

Q. What relationship, if any, did Nancy Probasco sustain to Henry Miller?

A. She is related to his wife, not to Henry Miller.

Q. And what age is Nancy Probasco,—at the time of Henry Miller's death?

1576 A. Fifty-two.

Q. What relationship did Anna Sibley Robinson sustain to Henry Miller?

A. Sister-in-law.

Q. And what was her age at the time of Henry Miller's death?

A. Seventy-five.

Q. What is her birthday?

A. August 21, 1841.

Q. Is she alive now?

1577 A. She is.

Q. All of the persons whose names I have mentioned in asking you their ages and relationship are now alive, are they, Mr. Brown, excepting those you specifically told us were dead?

A. Yes.

Q. What relationship, if any, did Josephine Place bear to Henry Miller?

A. None.

Q. What relationship, if any, did Dorothy Otto, sustain to Henry Miller?

1578 A. None.

Q. Did Mr. and Mrs. Richard Brem sustain any relationship to Henry Miller?

A. No.

Q. How many children did they have at the time of Mr. Miller's death?

A. Three.

Q. And what are their names?

A. Henry Brem, George Brem and Richard Brem, Jr.

1579 Q. And give the ages of Mr. Brem's children.

A. The first, Henry Brem, twenty-one; George Brem, nineteen; Richard Brem, Jr., seventeen.

Q. I will ask you whether or not the following persons were employed by Henry Miller or Miller & Lux, Incorporated, at the time of Henry Miller's death,—Charles Z. Merritt?

A. Employed.

Q. Edwin G. Rodolph?

A. Employed.

1580 Q. David Brown?

A. Employed.

Q. John Dillon?

A. Employed.

Q. William Mitchell?

A. Employed.

Q. John Gilcrest?

A. Not employed.

Q. Charles Reddy?

A. Employed.

1581 Q. James Ogden?

A. Not employed.

Q. D. A. Leonard?

A. Not employed.

Q. D. W. Wallis?

A. Not employed.

Q. E. F. Ogle?

A. Employed.

Q. Hugh T. Gower?

A. Employed.

Q. Charles Robinson?

1582 A. Not employed.
Q. Edwin M. Jordan?
A. Employed.
Q. Peter Arbios?
A. Died before testator.
Q. Henry Bader?
A. Employed.
Q. Mrs. Henry Bader?
A. Employed.
Q. H. C. Safstrom?
1583 A. Employed.
Q. Cyrus B. Swift?
A. Not employed.
Q. Benjamin Miller?
A. I do not know him; employed.
Q. Gus A. Lastine?
A. I understand he is employed.
Q. The office records so show?
A. Yes.
Q. Henry Pfeiffer?
1584 A. Employed.
Q. Mrs. Emil Marquart?
A. Not employed.
Q. Nacisio Castro?
A. Employed.
Q. J. Rock Tofalo?
A. Employed.
Q. Jesus Lopez?
A. Employed.
Q. Louis Gonzales?
A. Employed.

1585 Q. Mary Taylor?

A. Not employed.

Q. William Bedell?

A. Employed.

Q. Miss Thomas, stenographer in the office of Miller & Lux?

A. Employed.

Q. What is her full name, Mr. Brown?

A. I do not know; the initials are M. M.

Q. Miss Deeney?

1586 A. M. V. Deeney; employed.

Q. Miss Wilson?

A. M. C. Wilson; employed.

Q. Were all of these persons whose names you have given as being employed, employed by Miller & Lux, Incorporated, or Mr. Miller?

A. William Bedell is a house servant.

Q. He was a house servant for Mr. Miller?

A. Yes.

Q. And all the rest were employed by Miller

1587 & Lux, Incorporated, that you stated were employed?

A. Beginning with Charles Z. Merritt.

Q. That is correct, Miller & Lux, Incorporated?

A. Yes.

Q. Where you answer was that they were employed?

A. Yes.

Q. The San Francisco Home for Incurables mentioned in the trust deed is a corporation, is it, Mr. Brown?

1588 A. I do not know.

Q. Is Sarah E. Miller the surviving wife of Mr. Miller's son?

A. Yes.

Q. Referring now to the stock certificate book of Miller & Lux, Incorporated, Mr. Brown, you have that book with you, have you?

A. Yes.

Q. Prior to April, 1913, was Mr. Miller the owner, as shown by the stock book of 119,871.75

1589 shares of said corporation?

A. 119,871.75; he was the owner of 119,871.75 shares, yes.

Q. Evidenced by how many certificates, Mr. Brown?

A. Five.

Q. Give the numbers of the certificates and amounts of shares for which they were issued, respectively?

A. Certificate No. 115, number of shares 119,-

1590 839.75; certificate No. 92, 10 shares; certificate No. 113, 10 shares; certificate No. 81, 2 shares; certificate No. 112, 10 shares.

Q. Were those certificates subsequently surrendered and cancelled—in whose name do those certificates stand,—prior to April, 1913?

A. Prior to the transfer of the trust deed the shares 119,839.75 stood in the name of Henry Miller.

Q. That is, certificate No. 115?

A. Certificate No. 114.

1591 Q. Now, take the next certificate that you mention,— in whose name did that stand in?

A. Certificate No. 92 stood in the name of Frank B. Anderson.

Q. Endorsed by him?

A. Endorsed by him. Certificate No. 113 stood in the name of David Brown.

Mr. TREADWELL. Endorsed by him?

A. Endorsed by him. Certificate No. 81 stood in the name of Henry Miller; certificate No. 112
1592 stood in the name of C. Z. Merritt, endorsed by him.

Q. Are any of these certificates that you have mentioned cancelled?

A. The 119,839.75 certificate is cancelled.

Q. That is the certificate No. 115? No. 114, I should say?

A. No. 114.

Q. That is cancelled?

A. Yes.

1593 Q. The other four certificates are not cancelled?

A. No.

Q. On what date was certificate No. 114 cancelled, Mr. Brown?

A. The 17th of April, 1913.

Q. And from what record do you get that date?

A. From the stub of the certificate book.

Q. And what certificate was issued in place of it?

1594 A. Certificate No. 115.

Q. For how many shares?

A. 119,839.75.

Q. In whose name was the certificate No. 115 issued?

A. Nellie Miller Nickel and J. Leroy Nickel, as trustees.

Q. And that certificate was issued April 17, 1913?

A. Yes.

1595 Q. Is there any receipt in the certificate book for this certificate?

A. Yes.

Q. Who signed the receipt?

A. J. Leroy Nickel, trustee.

Q. Did Mrs. Nickel sign as co-trustee?

A. Her name does not appear.

Q. Referring to certificate No. 114, is that receipted for by Henry Miller on the stub?

A. Henry Miller, by J. Leroy Nickel, as at-

1596 torney in fact.

Q. And what is the date of issuance of the original certificate No. 114?

A. 16th of April, 1913.

Q. What certificate or certificates was certificate No. 114 issued for, as shown by the certificate book?

A. Certificate No. 80, 74,296.03⅓.

Q. And the names in which that certificate stand?

A. Las Animas & San Joaquin Land Co., Incorporated. Certificate No. 82, 33.66 shares,

1597 issued to Las Animas & San Joaquin Land Co., Incorporated; Certificate No. 83, 42.10 shares, issued to Las Animas & San Joaquin Land Co., Incorporated; Certificate No. 86, 252.54 shares, issued to Las Animas & San Joaquin Land Co., Incorporated; Certificate No. 89, 414.36 shares, issued to Las Animas & San Joaquin Land Co., Incorporated; Certificate No. 95, 2 shares, issued to Las Animas & San Joaquin Land Co., Incorporated; Certificate No. 111, 44,799.05⅔ shares,
1598 issued to Las Animas & San Joaquin Land Co., Incorporated.

Q. How long have you had charge of the stock certificate book, Mr. Brown?

A. Since incorporation.

Q. Was it Mr. Miller's custom to sign up certificates in blank?

A. Yes.

Q. Referring to certificate No. 115, when, if you know, was Henry Miller's signature placed
1599 on that certificate?

A. I never knew.

Q. It might have been considerably prior to the date of the certificate itself,—April 17, 1913?

A. I could not say.

Q. Turn over to the certificates, Mr. Brown, the unissued certificates,—are there any signed by Henry Miller there?

A. Yes.

Q. How many?

A. Five.

1600 Q. Commencing with No. 116, which is unissued and blank, you have five certificates signed by Mr. Miller?

A. Yes.

Q. Were these signatures all made at the same time to the certificates?

A. I cannot tell, probably so.

Q. What is your recollection as to how long those certificates have been signed up?

A. I have no recollection.

1601 Q. Would you say two or three years before April, 1913?

A. No.

Q. By comparing, Mr. Brown, this signature on this power of attorney, which was executed February 14, 1911, with the signature on say certificate No. 116, it is very apparent, is it not, that Mr. Miller did not sign the certificate No. 116 subsequent to February, 1911?

A. I think he did.

1602 Q. Mr. Brown, have you with you the record book of any payments of money made by Mr. and Mrs. Nickel to Mr. Miller subsequent to April 17, 1913?

A. Subsequent to when?

Q. April 17, 1913.

A. Yes.

Q. Give us the dates and amounts of such payments.

A. June 10, 1913, $8717.97.

Q. What is the description of that payment as contained in this book?

1603 A. That is the balance at the debit of Henry Miller on the 31st day of May, 1913, on the books of Miller & Lux.

Q. The next item is what?

A. July 11th, $14,849.47.

Q. Described in the same way?

A. Described in the same way the following month.

Q. The next item?

A. August 6th, $4016.28, described in the same way.

1604

Q. Proceed.

A. Sept. 4th, $7399.36, described in the same way; October 20th, $6701.35, described in the same way; October 22nd, $12,955.77, described in the same way; November 18th, $5545.93, described in the same way; December 11th, $5033.41, described in the same way; 1914, March 9th, $18,348.52, described in the same way; April 6th, $4422., described in the same way; July 6th, $14,795.40, described in the same way. Similarly, this book shows approximately monthly payments from July 6, 1914, to October 9, 1915, the total of all these payments aggregating $263,876.57.

1605

Q. Those represent payments made by Mr. and Mrs. Nickel to Mr. Miller, or for his account?

A. For his account.

Q. His personal account?

A. His personal account.

1606 Q. Does this book also contain a record of dividends declared by Miller & Lux?

A. Yes.

Q. How many are there?

A. Thirteen.

Q. It contains a record of thirteen dividends, —commencing when?

A. May 15, 1913.

Q. And up to what date?

A. July 25, 1916.

1607 Q. Representing a total of how much money?

A. $275,706.01.

Q. Is there a dividend book kept by Miller & Lux, Incorporated, Mr. Brown?

A. Yes.

Q. Does that show the complete record of the dividends which are evidenced here as to certain shares only?

A. Yes.

Q. Shows the same dividends in the same pro rata per share?

1608 A. Yes.

Q. Prior to May 15, 1913, but six dividends had been declared by Miller & Lux, Incorporated, that is correct, is it, Mr. Brown?

A. Yes.

Q. In other words, this dividend of May 15, 1913, is No. 7?

A. Yes.

Q. Do you know of any previous power of attorney given by Mr. Miller to Mr. Nickel, or anyone else?

1609 A. I do not remember.

Q. Prior to February, 1911?

A. I do not remember.

Q. That is all, Mr. Treadwell.

Cross-Examination.

Mr. Treadwell. Q. Mr. Brown, the certificates of stock which you have produced here, aggregating 119,871.75 shares of the capital stock of Miller & Lux, Incorporation, you brought
1610 with you in this envelope (indicating) that is with them, did you?

A. Yes.

Q. And I would ask you if that envelope has upon it the following endorsement: "The within certificates, to wit:

Certificate No.	No. of Shares.
115	119,839.75
92	10
113	10
1611 81	2
112	10
Total	119,897.75

were this day delivered by Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as trustees, dated April 17, 1913, J. Leroy Nickel, trustee" —that appears on that envelope, does it?

A. Yes.

Q. Is that signature the handwriting of J. Leroy Nickel?

1612 A. Yes.

Q. This certificate No. 115, for 119,839.75 shares, was issued to Nellie Miller Nickel and J. Leroy Nickel, as trustees, by yourself, in lieu of the prior certificate No. 114 for the same number of shares in the name of Henry Miller, —is that correct?

A. Yes.

Q. Is this certificate No. 114,—you cancelled that in the ordinary way, did you?

1613 A. Yes.

Q. You pasted it in the certificate book?

A. Yes.

Q. And you struck off the signatures upon the certificate?

A. Yes.

Q. And you noted in the margin that it was cancelled by certificate No. 115 issued?

A. Yes.

Q. And you noted the date of cancellation as

1614 April 17, 1913?

A. Yes.

Q. And on the back of that certificate of No. 114 appears the name of Henry Miller?

A. Yes.

Q. Is that in the handwriting of Henry Miller?

A. Yes.

Q. Now, this other certificate No. 81, which was issued to Henry Miller, back of that appears the name of Henry Miller endorsed thereon?

1615 A. Yes.

Q. Is that his signature?

A. Yes.

Q. Now, those other three certificates included in this envelope, in the names of Frank B. Anderson, David Brown and C. Z. Merritt, were those directors' stock, stock held by these men as directors?

A. Held by those men as directors.

Q. Who was the beneficiary owner of that,
1616 prior to this transfer to the trustees?

A. Henry Miller.

Q. In other words, these directors simply held the legal title, it was in their names for the purpose of qualifying them as directors?

A. Yes.

Q. But always in the possession of Henry Miller and always endorsed with their signatures on it?

A. Yes.

1617 Q. Now, as to the actual custody of these shares of stock after they were transferred to the trustees and placed in this envelope, do you know where they were kept?

A. I believe they were kept in the Mercantile Trust Company.

Q. At any rate, they were not in your custody after that time?

A. No.

Q. But you did understand that the trustees had a box there of their own?

1618 A. Yes.

Q. But you had no custody of that?

A. No.

Q. Now, we offer in evidence these certificates which have been referred to by the witness, viz: Cancelled certificate No. 114, for 19,839.75 shares, together with the stub and the endorsement of Henry Miller on the back thereof.

Referee. Respondent's Exhibit No. 4.

Mr. Treadwell. Certificate No. 115, for 119,-
1619 839.75 shares, issued to Nellie Miller Nickel and J. Leroy Nickel, as trustees.

Referee. Respondent's Exhibit No. 5.

Mr. Treadwell. Certificate No. 92, issued to Frank B. Anderson, with his endorsement thereon.

Referee. Respondent's Exhibit No. 6.

Mr. Treadwell. Certificate No. 113, for 10 shares, issued to David Brown, with his endorsement thereon.

Referee. Respondent's Exhibit No. 7.

1620 Mr. Treadwell. Certificate No. 81, issued to Henry Miller, for 2 shares, with his endorsement thereon.

Referee. Respondent's Exhibit No. 8.

Mr. Treadwell. Certificate No. 112, issued to C. Z. Merritt, with his endorsement thereon.

Referee. Respondent's Exhibit No. 9.

Mr. Treadwell. Together with the envelope in which all of the certificates, with the exception of No. 114, are contained, and we ask per-

1621 mission that they be not marked,—that we may withdraw them and furnish, to the satisfaction of Mr. Peart, photographic copies of them.

REFEREE. Yes, with these descriptions.

Respondent's Exhibit No. 10.

Mr. TREADWELL. Q. Now, you have referred, Mr. Brown, to a book of account, and I would ask if that is in the form of an ordinary cash ledger account book, and the heading, Cash and Ledger?

1622 A. Yes.

Q. I would ask you if on the book is printed, in gold letters, the following: "Nellie Miller Nickel and J. Leroy Nickel, Trustees" and on the side the words "Nellie Miller Nickel and J. Leroy Nickel, Trustees"?

A. Yes.

Q. And then I would ask you if the book contains one side devoted to dividends received by the trustees upon this stock, to wit, 119,871.75

1623 shares of Miller & Lux, Incorporated, and on the other side the amounts paid by the trustees, either to or on behalf of Henry Miller?

A. Yes.

Mr. TREADWELL. We would ask that that whole account, together with the endorsement on the outside be likewise copied into the record. We would ask to withdraw the original and supply copies for the record?

REFEREE. Yes, that will do.

Respondent's Exhibit No. 11.

1624 Mr. TREADWELL. Q. So at the time of the transfer from Mr. Miller to the trustees Mr. Miller was the owner of 119,871.75 shares out of 120,000 shares of Miller & Lux, Incorporated?

A. Yes.

Q. And at the time of his death the same amount was held by these trustees?

A. Yes.

Q. The balance of the stock of Miller & Lux, Incorporated, was held and owned by other

1625 persons?

A. Yes.

Q. So as to complete this record, Mr. Peart, would you not be willing to admit that the San Francisco Home for Incurables is a charitable institution?

Mr. PEART. Yes, we will admit that it is a charitable institution, but whether it is organized under the laws of this state or not is a question which should be solved, because the

1626 statute is different. We must have some proof on that. In other words, Mr. Treadwell, if we ascertain that it is organized under the laws of this state either as a corporation or association that fact may go into the record.

Mr. TREADWELL. You will admit that it is conducting its charitable work in the City and County of San Francisco, State of California?

Mr. PEART. Yes.

Mr. TREADWELL. And you will also admit that the First English Evangelical Lutheran Church is located in San Francisco?

1627 Mr. PEART. Yes.

Mr. TREADWELL. And is of a charitable nature?

Mr. PEART. Religious and charitable.

Mr. TREADWELL. I think that is all, Mr. Brown.

Re-direct Examination.

Mr. PEART. Q. Was this cancellation of certificate No. 114 personally attended to by you as secretary, Mr. Brown?

A. Yes.

1628 Q. And where,—at the office of Miller & Lux?

A. At the office of Miller & Lux.

Q. And the issuance of certificate No. 115, was that done immediately on the cancellation of certificate No. 114?

A. Yes.

Q. Was that also done at the office of Miller & Lux?

A. Yes.

Q. Who gave you certificate No. 114 to
1629 cancel?

A. I do not recall the event; it might have been Mr. Treadwell or it might have been brought out from the inner office by a boy; I cannot recall.

Q. You cannot recall?

A. No.

Q. It might have been done simply on a pencil memorandum and no one present but yourself?

A. No.

1630 Q. In any event, Mr. Henry Miller himself was not present when certificate No. 114 was cancelled and No. 115 issued?

A. I could not say.

Q. You do not remember whether he was down to the office that day or not?

A. No, I could not say.

Q. You know, as a matter of fact, that he was confined to his house at that time?

A. No, I do not know. He used to blow in
1631 quite unexpectedly, and I would see him sitting in the office there.

Q. Mr. Brown, I think I asked you that once before. Mrs. Nickel, his daughter, testified that Mr. Miller went to the office about two or three times after his illness, and Mr. E. Frank Campbell, the nurse who was in daily attendance upon Mr. Miller from 1910 up to about three or four months before he died, testified that he went down to the office twice during that entire period;
1632 your recollection would be, to a very large extent, guided by what his daughter and nurse told us?

A. No, that would not control me; I simply know he was there a certain number of times, a different number of times; I do not know how often he was there.

Q. You did not pay very much attention whether he was there or not?

A. No.

1633 Re-cross Examination.

Mr. Treadwell. Q. I neglected to ask you, Mr. Brown, if your book also contains the stub for certificate No. 115?

A. Yes.

Q. And has that on it the receipt of J. Leroy Nickel, trustee, dated the 17th of April, 1913?

A. Yes.

Q. For that certificate?

A. Yes.

1634 Mr. Treadwell. We will ask that it go in as part of certificate No. 115, and will furnish copy of it.

Referee. It may go in.

Mr. Peart. That will be all for today, Mr. Brown. We will adjourn until some date to be set.

Referee. Adjourned.

1635 State's Exhibit No. "F."

Know all men by these presents:

That I, Henry Miller, of the City and County of San Francisco, State of California, do by these presents appoint J. Leroy Nickel, of said city and county, attorney in fact, for me and in my name, and for my use and benefit to demand, sue for, collect and receive all such sums of money, debts, dues, accounts, legacies, bequests, interests, dividends, annuities and demands,

1636 whatsoever, as are now or shall hereafter become due, owing, payable or belonging to me and have, use and take all lawful ways and means in my name or otherwise for the recovery thereof by attachment, arrest or otherwise, and to compromise and agree for the same, and discharges for the same, for me and in my name, to make and deliver; contract for, purchase, receive and take lands, tenements, hereditaments, and accept the seisin and possession of all lands, and all
1637 deeds and other assurances in the law therefor, and to lease, let, sell, release, convey, mortgage and hypothecate, lands, tenements and hereditaments upon such terms and conditions, and under such covenants as he shall think fit. Also to bargain for, buy, sell, mortgage, hypothecate, and in any and every way and manner, deal in and with goods, wares and merchandise, choses in action, and other property in possession or in action, and to do every kind of business of
1638 what nature or kind soever, and also for and in my name, and as my act and deed to sign, seal, execute, deliver and acknowledge such deeds, leases and assignments of leases, covenants, indentures, agreements, mortgages, hypothecations, bottomries, charter parties, bills of lading, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgments and other debts, and such other instruments in writing of whatever kind and nature as may be necessary; and also to vote as my proxy any stock

held by me in Miller & Lux, Incorporated, Las Animas & San Joaquin Land Company Incorporated, The San Joaquin & Kings River Canal & Irrigation Company Incorporated, or any other corporation, for not exceeding one (1) year after the date hereof.

Giving, unto my said attorney full power to perform every act and thing which he may think necessary to be done in and about the premises, as fully to all intents and purposes as I might or could do if personally present hereby ratifying and confirming all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

In witness whereof, I have hereunto set my hand the 14th day of February, one thousand nine hundred and eleven.

HENRY HENRY.

HENRY MILLER.

Signed and delivered in the presence of E. Frank Campbell.

State of California,

City and County of San Francisco.—ss.

On this second day of March in the year one thousand nine hundred and eleven before me, M. V. Collins, a notary public in and for the said city and county, residing therein, duly commissioned and sworn, personally appeared E. Frank Campbell, known to me to be the same person whose name is subscribed to the within instrument as a witness thereto, who, being by me

duly sworn, deposed and said that he resides in the City and County of San Francisco, State of California, that he was present and saw Henry Miller personally known to him to be the same person described in and whose name is subscribed to and who executed the within instrument as a party thereto, sign, seal and deliver the same; and that the said Henry Miller acknowledged in the presence of said affiant that he executed the same and that he, the said affiant, subscribed his name to said instrument as a witness thereto.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year in this certificate first above written.

(Notarial Seal) M. V. COLLINS,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires April 14, 1913.

(Endorsed): Power of attorney, Henry Miller to J. Leroy Nickel.

Dated, February 14, A. D. 1911.

Filed for record at the request of Miller & Lux Incorporated, January 13th, A. D. 1916, at 3 min. past 9 o'clock A. M., and recorded in book D of Powers of Attorney, page 165, Monterey County Records. P. W. Soto, Recorder. By N. Wallace, Deputy Recorder.

1645 RESPONDENT'S EXHIBIT No. 4.

No. of Certificate 114. No. of shares 119,839-75/100. In place of Cert. Nos. 80, 82, 83, 86, 89, 95, 111 by whom Las Animas & San Joaquin Land Company, Incorporated, to whom Henry Miller.

Date, 16th April, 1913.

Received the above certificate subject to the articles of incorporation and by-laws of the company.

1646 HENRY MILLER,
By J. Leroy Nickel,
His Attorney-in-fact.

Cancelled by issue of No. 115.

Date of cancellation 17th Apr., 1913.

Capital Stock $12,000,000.00,

No. 114 Shares 119,839.75/100

Miller & Lux, Incorporated.

1647 This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent therein is the State Agent and Transfer Syndicate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have

1648 been issued and at the date hereof are outstanding; that

HENRY MILLER

is the owner of one hundred and nineteen thousand eight hundred and thirty-nine 75/100 shares of the said capital stock, transferable only on the books of the corporation by endorsement hereon and surrender of this certificate, and that the same are fully paid up and non-assessable.

In witness whereof, the said corporation has
1649 caused this certificate to be signed by its president and secretary, and its corporate seal hereunto affixed, this 15th day of April, 1913.

(Corporate Seal)

~~HENRY MILLER, President.~~

~~DAVID BROWN, Secretary.~~

120,000 shares $100 each.

(Endorsed): HENRY MILLER.

RESPONDENT'S EXHIBIT No. 5.

1650 Capital Stock $12,000,000.00.

No. 115 Shares 119,839-75/100

Miller & Lux, Incorporated.

This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent therein is the State Agent and Transfer Syndicate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one

hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have been issued and at the date hereof are outstanding; that

Nellie Miller Nickel and J. Leroy Nickel as trustees are the owners of one hundred and nineteen thousand eight hundred and thirty-nine 75/100 shares of the said capital stock, transferable only on the books of the corporation by
1652 endorsement hereon and surrender of this certificate, and that the same are fully paid up and non-assessable.

In witness whereof, the said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal hereunto affixed this 17th day of April, 1913.

(Corporate Seal)

HENRY MILLER, President,

DAVID BROWN,

1653 Secretary.

120,000 shares $100 each.

RESPONDENT'S EXHIBIT No. 6.

Capital stock $12,000,000.00.

No. 92 Shares 10.—

Miller & Lux, Incorporated.

This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the

State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent therein is the State Agent and Transfer Syndicate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have been issued and at the date hereof are outstanding; that

FRANK B. ANDERSON

is the owner of ten No._____shares of the said capital stock, transferable only on the books of the corporation by endorsement hereon and surrender of this certificate, and that the same are fully paid up and non-assessable.

In witness whereof, the said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal hereunto affixed, this thirtieth day of December, 1909.

(Corporate Seal)

HENRY MILLER,
President,
DAVID BROWN,
Secretary.

120,000 shares $100 each.

(Endorsed): FRANK B. ANDERSON.

1657 RESPONDENT'S EXHIBIT No. 7.

Capital stock $12,000,000.00.

No. 113 Shares 10—

Miller & Lux, Incorporated.

This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent
1658 therein is the State Agent and Transfer Syndicate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have been issued and at the date hereof are outstanding; that

1659

DAVID BROWN

is the owner of ten _____ shares of the said capital stock, transferable only on the books of the corporation by endorsement hereon and surrender of this certificate, and the same are fully paid up and non-assessable.

In witness whereof, the said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal here-

1660 unto affixed this 18th day of February, 1911.

(Corporate Seal)

HENRY MILLER,
President.

DAVID BROWN,
Secretary.

120,000 shares $100 each.

(Endorsed): DAVID BROWN.

1661 RESPONDENT'S EXHIBIT No. 8.

Capital stock $12,000,000.00.

No. 81 Shares 2—

Miller & Lux, Incorporated.

This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent therein is the State Agent and Transfer Syndi-

1662 cate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have been issued and at the date hereof are outstanding; that

HENRY MILLER

is the owner of two _____ shares of the said capital stock, transferable only on the books

1663 of the corporation by endorsement hereon and surrender of this certificate, and that the same are fully paid up and non-assessable.

In witness whereof, the said corporation has caused this certificate to be signed by its president and secretary, and its corporate seal hereunto affixed this 25th day of May, 1908.

(Corporate Seal)

HENRY MILLER,
President,

1664 DAVID BROWN,
Secretary.

120,000 shares $100 each.

(Endorsed): HENRY MILLER.

RESPONDENT'S EXHIBIT No. 9.

Capital stock $12,000,000.00.

No. 112 Shares 10—

Miller & Lux, Incorporated.

1665 This certifies that Miller & Lux, Incorporated, is a corporation organized under the laws of the State of Nevada; that its principal office is at 116 N. Carson street, Carson City, Ormsby County, in said state; that its resident agent therein is the State Agent and Transfer Syndicate, Incorporated, a corporation; that the total amount of its authorized capital stock is the sum of twelve million dollars divided into one hundred and twenty thousand shares of the par value of one hundred dollars each, all of which is common stock; that all of said shares have

1666 been issued and at the date hereof are outstanding; that

C. Z. Merritt

is the owner of ten ..... shares of the said capital stock, transferable only on the books of the corporation by endorsement hereon and surrender of this certificate, and that the same are fully paid up and non-assessable.

In witness whereof, the said corporation has caused this certificate to be signed by its presi-
1667 dent and secretary, and its corporate seal hereunto affixed, this 18th day of February, 1911.

(Corporate Seal)

Henry Miller, President,

David Brown,

Secretary.

120,000 shares $100 each.

(Endorsed): C. Z. Merritt.

1668 Respondent's Exhibit No. 10.

The within certificates, to wit:

Certificate No.	No. of Shares.
115	119,839.75
92	10
113	10
81	2
112	10
Total	119,871.75

1669 were this day delivered by Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as trustees.

Dated, April 17th, 1913.

J. LEROY NICKEL,
Trus.

RESPONDENT'S EXHIBIT No. 11.

2

1913

1670 May 15 Henry Miller 1 Dividend No. 7 from Miller & Lux Incorporated 119,871.75 shares @ 15c. $17,980.76

July 10 Henry Miller 1 Dividend No. 8 from Miller & Lux Incorporated 119,871.75 shares @ 15c. 17,980.76

Oct. 17 Henry Miller 1 Dividend No. 9 from Miller & Lux Incorporated 119,871.75 shares @ 25c. 29,967.94

1671

1914

Mch. 9 Henry Miller 1 Dividend No. 10 from Miller & Lux Incorporated 119,871.75 shares @ 20c. 23,974.35

Forward $89,903.81

1672 4

1914

	Forward	$89,903.81
July	2 Henry Miller 1 Dividend No. 11 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76
Sept.	25 Henry Miller 1 Dividend No. 12 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76
Dec.	28 Henry Miller 1 Dividend No. 13 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76

1673

1915

Mch.	4 Henry Miller 1 Dividend No. 14 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76
Apl.	27 Henry Miller 1 Dividend No. 15 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76
Aug.	13 Henry Miller 1 Dividend No. 16 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76

1674

6

1915

	Forward	$197,788.37
Dec.	9 Henry Miller 1 Dividend No. 17 from Miller & Lux Inc. 119,871.75 shares @ 15¢	17,980.76

1675	1916		
	Apl.	7 Henry Miller 1 Dividend No. 18 from Miller & Lux Inc. 119,871.75 shares @ 25¢	29,967.94
	July	25 Henry Miller 1 Dividend No. 19 from Miller & Lux Inc. 119,871.75 shares @ 25¢	29,967.94
	1913		3
	June	10 Henry Miller 1 M. & L. Inc. —balance acct. May 31/13	8717.97
1676	July	11 Henry Miller 1 Balance M. & L. Inc. acct. June 30/13	14,849.47
	Aug.	6 Henry Miller 1 Balance M. & L. Inc. acct. July 31/13	4016.28
	Sept.	4 Henry Miller 1 Balance M. & L. Inc. acct. Aug. 31/13	7399.36
	Oct.	20 Henry Miller 1 Balance M. & L. Inc. acct. Sept. 30/13	6701.35
		22 Henry Miller 1 M. & L. Inc. on acct. October	12,955.77
1677	Nov.	18 Henry Miller 1 M. & L. Inc. —bal. Oct. a/c	5545.93
	Dec.	11 Henry Miller 1 Balance M. & L. Inc. November a/c	5033.41
	1914		
	Mch.	9 Henry Miller 1 Balance M. & L. Inc. a/c 2/28.14	18,348.52
	Apl.	6 Henry Miller 1 Balance M. & L. Inc. a/c 3/31/14	4422.
		Forward	$87,990.06

1678	1914			5
		Forward		$87,990.06
	July	6	Henry Miller 1 Balance M. & L. Inc. a/c 6/30/14	14,795.40
	Aug.	28	Henry Miller 1 Balance M. & L. Inc. a/c to 7/31/14	4562.67
	Sept.	28	Henry Miller 1 Balance M. & L. Inc. a/c to 8/31/14	4300.85
	Oct.	20	Henry Miller 1 Balance M. & L. Inc. a/c to 9/30/14	4413.62
1679	Nov.	17	Henry Miller 1 Balance M. & L. Inc. a/c to 10/31/14	7857.81
	Dec.	30	Henry Miller 1 Balance M. & L. Inc. a/c to 11/30/14	5101.12
	1915			
	Jan.	7	Henry Miller 1 Balance M. & L. Inc. a/c to 12/31/14	10,587.70
	Mch.	4	Henry Miller 1 Balance M. & L. Inc. a/c to 2/28/15	13,304.10
	Apl.	27	Henry Miller 1 Balance M. & L.	
1680			Inc. a/c to 3/31/15	8370.83
	May	12	Henry Miller 1 Balance M. & L. Inc. a/c to 4/30/15	4994.68
	June	22	Henry Miller 1 Balance M. & L. Inc. a/c to 5/31/15	4830.17
	July	22	Henry Miller 1 Balance M. & L. Inc. a/c to 6/30/15	5 5275.61
	Aug.	13	Henry Miller 1 Balance M. & L. Inc. a/c to 7/31/15	5427.23

1681	1915		7
		Forward	181,761.85
	Nov.	3 Henry Miller 1 M. & L. Inc. to bal. a/c 9/30/15	14,484.57
	Dec.	2 Henry Miller 1 M. & L. Inc. to bal. a/c 11/30/15	9642.46
	1916		
	Apl.	5 Henry Miller 1 M. & L. Inc. to bal. a/c 3/31/16	26,132.54
	July	8 Henry Miller 1 M. & L. Inc.	
1682		to bal. a/c 5/31/16	9526.75
		25 Henry Miller 1 M. & L. Inc. to bal. a/c 6/30/16	5299.90
	Aug.	1 Henry Miller 1 M. & L. Inc. to bal. a/c 7/31/16	5130.32
	Sept.	8 Henry Miller 2 M. & L. Inc. to bal. a/c 8/31/16	4991.61
	Oct.	9 Henry Miller 2 M. & L. Inc. to bal. a/c 9/30/16	6906.57

Endorsed:

1683 Nellie Miller Nickel
and
J. Leroy Nickel
Trustees

Endorsed:

Cash & Ledger
Nellie Miller Nickel
and
J. Leroy Nickel
Trustees

1684 RESPONDENT'S EXHIBIT No. 1.

LAST WILL AND TESTAMENT OF HENRY MILLER.

[The said last will and testament is the same as the last will and testament attached to the petition herein.]

RESPONDENT'S EXHIBIT No. 2.

CODICIL OF LAST WILL AND TESTAMENT OF HENRY MILLER.

1685

[The said codicil is the same as the codicil attached to the petition herein.]

RESPONDENT'S EXHIBIT No. 3.

DEED OF TRUST.

[The said deed of trust is the same as the deed of trust attached to the petition herein.]

1686

PETITIONER'S EXHIBIT B.

NEVADA.

HUMBOLDT COUNTY.

Contract No.	Name	Balance of Principal
4884	N. H. A. Mason	$ 240.
4885	Charles E. Moore	160.
4886	Victor D. Duboce	80.
4887	Frank J. French	439.36

1687	4888	Arthur F. Price	640.
	4889	Victor D. Duboce	477.27
	4937	Wm. C. Jacobs	120.
	8662	John J. Dillon	239.09
	3511	Sarah F. Stewart	200.
	657	Lawrence Archer	106.67
	1293	P. Young Mason	177.78
	1683	Dixie Mason	281.90
	1684	R. U. Mason	284.85
	3525	Margaret Iles	517.09
1688	3526	Alfred Iles	631.77
	3527	Victor D. Duboce	80.
	3528	William C. Stroud	640.
	3529	Samuel Mount	640.
	3530	Abraham L. Schocken	600.
	3531	Samuel Rosener	639.29
	3532	Alfred E. Davis	640.
	3533	David B. Hunt	640.
	3534	John G. Edmondson	640.80
	826	Maud J. Mason	106.67
1689	830	G. G. Kimball	106.55
	831	George Husecroft	106.67
	840	B. F. Sherman	106.67
	844	Geo. W. Rutherford	26.67
	845	W. A. January	80.
	952	John Boggs	88.90
	1950	Joseph Clark	279.22
	1951	Fielding Lemmon	71.11
	1952	James A. Evans	249.77
	1953	John Boggs	106.67
	1954	U. S. Nye	248.90

1690	1955	Albin Caldin	142.22
	1956	Enos C. Hunter	142.22
	2039	E. F. Mason	142.22
	2040	N. H. A. Mason	355.56
	3563	John E. Doyle	279.50
	2239	Wm. L. Dickinson	321.28
	2240	A. L. Bascom	320.
	2241	J. A. Moultrie	242.02
	2423	Elizabeth F. Mason	160.
	2424	G. W. Rutherford	160.
1691	3560	Walter B. Harrub	640.
	3561	Edward Fay	640.
	3562	Thos. H. Cunningham	623.
	9136	A. P. Baillaige (Part in Washoe Co.)	360.
	9139	James W. Glynn (Part in Washoe Co.)	320.
	9142	August Shopf	640.
	9147	S. W. Sheldon	636.25
	9149	Henry Miller, Jr.	
1692		(Part in Washoe Co.)	360.12
	9150	Frank Raux (Part in Washoe Co.)	513.99
	9152	John G. Otto (Part in Washoe Co.)	521.
	9159	Edward W. Potter	269.63
	9160	Frank B. Marks	640.
	9161	Hugh T. Gower	361.08
	9950	Henry Miller Sr.	481.41
	9952	Wm. S. Mitchell	591.45

1693

NEVADA.

HUMBOLDT COUNTY.

2

Contract No.	Name	Balance of Principal
9953	Henry Long (Part in Washoe Co.)	240.
3118	John Lillard	120.
8530	Edward C. Fowle (Part in Washoe Co.)	120.
1694		
3128	Wm. L. Dickenson	640.73
3129	Alpheus L. Bascom	240.80
5643	George W. Thompson	120.
5644	Sarah F. Stewart	40.
5721	James D. Minor, Jr.	40.
4701	Robert O'Neal	40.
4702	Philo M. Palmer	40.
4703	Janette Palmer	40.
4705	Burwell W. Stewart	160.
1695		
4706	B. W. Stewart	40.
4707	Sarah F. Stewart	120.
4708	James Pierson	281.26
5827	Dixie Mason	316.99
5828	Elizabeth F. Mason	640.
5829	Maud J. Mason	640.
5832	Elmore E. Purington	520.
5833	Albert H. Groth	200.
4768	James D. Minor, Jr.	160.

1696 NEVADA.

WASHOE COUNTY.

	Contract No.	Name	Balance of Principal
	9137	Albert H. Long	$ 640.
	9138	P. W. Robison	629.44
	9136	A. P. Baillage (Part in Washoe Co.)	280.
	9139	James W. Glynn (Part in Washoe Co.)	320.
1697	9140	John Goodwin	640.
	9141	James C. Allen	640.
	9144	F. P. Barry	640.
	9146	Daniel Healy	640.
	9149	Henry Miller, Jr. (Part in Washoe Co.)	240.
	9150	Henry Raux (Part in Washoe Co.)	120.
	9151	Ludwig H. Hartman	640.
	9152	John G. Otto	
1698		(Part in Washoe Co.)	120.
	9114	Sidney H. Smith	636.76
	9155	Henry Lux	639.53
	9951	Wm. T. McKinney	516.82
	9953	Henry Long (Part in Washoe Co.)	120.
	9954	Wm. B. Daingerfield	400.
	8530	Edward O. Fowle (Part in Washoe Co.)	80.

(Endorsed): Filed Apr. 19, 1917.

E. H. BEEMER, Clerk.

By S. C. Foster,

Deputy Clerk.

Petitioner's Exhibit C.

Specific Legacies.

Name	Age	Expectancy		Amount	Relation	Class	Primary Rate	Legal Exemption	Rates
rah E. Miller	59			$50,000.00	Wife of son	2	2%	$10,000	$15,000.00 @ 2% $1 25,000.00 @ 4% 1
nnie Pfeiffer Sheldon (Born Sept. 7, 1859)	57	16	Life Estate $30,000	15,075.75	Niece	2	2%	10,000	5,075.75 @ 2%
Josephine Sheldon Kirkham	27	Remainder		4,974.75	Grand niece	2	2%	10,000	———
Jeremiah Sheldon	26			4,974.75	Grand nephew	2	2%	10,000	———
Mildred Sheldon Cornett	24			4,974.75	Grand niece	2	2%	10,000	———
rah Long Brown (Born June 6, 1860)	56	17	Life Estate $20,000	10,315.70	Niece	2	2%	10,000	315.70
Albert Long's children:									
Mary Long	28			1,614.05	Grand niece	2	2%	10,000	———
Raymond Long	18			1,614.05	Grand nephew	2	2%	10,000	———
Elizabeth Long Barry's children:					Grand nephew	2	2%	10,000	———
Frank Barry	30	Remainder		1,076.03	Grand nephew	2	2%	10,000	———
George Barry	26			1,076.03	Grand niece	2	2%	10,000	———
Hazel Barry	21			1,076.04	Grand niece	2	2%	10,000	———
Nellie Long Whittington's children:									
Sarah Ethel Johnson	28			1,614.05	Grand niece	2	2%	10,000	———
Goldie Whittington	26			1,614.05	Grand niece	2	2%	10,000	———
izabeth Long Barry (Born July 22, 1857)	59	15	Life Estate $20,000	9,513.00	Niece	2	2%	10,000	———
Frank Barry	30	Remainder		3,496.66	Grand nephew	2	2%	10,000	———
George Barry	26			3,496.66	Grand nephew	2	2%	10,000	———
Hazel Barry	21			3,496.68	Grand niece	2	2%	10,000	———
llie Long Whittington (Born October 13, 1867)	49	22	Life Estate $20,000	12,062.70	Niece	2	2%	10,000	2,062.70
Sarah Ethel Johnson	28	Remainder		3,968.65	Grand niece	2	2%	10,000	———
Goldie Whittington	26	Remainder		3,968.65	Grand niece	2	2%	10,000	———
bert Long (Died before testator)	---			———		---	---	---	———
nry Long (Born July 20, 1862)	54	18	Per month for life $30 ($10,000)	6,501.42	Nephew	2	2%	10,000	———
bert Pfeiffer (Died before testator)	---			———		---	---	---	———
artha Rembold's children:					Widow of nephew				
Albert Alexander Rembold	19			2,500.00	Grand nephew	2	2%	10,000	———
Henry Gustave Rembold	17			2,500.00	Grand nephew	2	2%	10,000	———
David Aaron Rembold	15			2,500.00	Grand nephew	2	2%	10,000	———
Nathan Herman Rembold	13			2,500.00	Grand nephew	2	2%	10,000	———
innie Elizabeth Pfeiffer Turner	30			10,000.00	Grand niece	2	2%	10,000	———
enry John Pfeiffer	30			10,000.00	Grand nephew	2	2%	10,000	———
Albert Pfeiffer, Jr.	28			10,000.00	Grand nephew	2	2%	10,000	———
ustave Rembold Maas	25			5,000.00	Great grand nephew	2	2%	10,000	———
Phillip Rembold Maas	23			5,000.00	Great grand nephew	2	2%	10,000	———
ustave Rembold	46			5,000.00	Grand nephew	2	2%	10,000	———
Nancy Probasco	52			15,000.00	Daughter of sister of wife	5	5%	5,000	15,000.00

SPECIFIC LEGACIES—Continued.

Name	Age	Expectancy	Amount	Relation	Class	Primary Rate	Legal Exemption	Rates	Tax
Anna Sibley Robinson (Born Aug. 21, 1811)	75	6 Life Estate $10,000	$2,599.40	Sister of wife	5	5%	None	$2,599.40 @ 5%	$129.97
Children of Minnie Pfeiffer Sheldon:									
Josephine Sheldon Kickham	27	Remainder	2,466.86	Grand niece	2	2%	10,000		
Jeremiah Sheldon	26		2,466.86	Grand nephew	2	2%	10,000		
Mildred Sheldon Cornett	24		2,466.88	Grand niece	2	2%	10,000		
oseph Place			5,000.00	Son of sister of wife	5	5%	None	5,000.00 @ 5%	250.00
orothy Otto			1,000.00	None	5	5%	None	1,000.00 @ 5%	50.00
hildren of Richard Brem and Christina Fisher Brem		($5,000)							
Henry Brem	21		1,666.66	None	5	5%	None	1,666.66 @ 5%	83.33
George Brem	19		1,666.66	None	5	5%	None	1,666.66 @ 5%	83.33
Richard Brem, Jr.	17		1,666.68	None	5	5%	None	1,666.68 @ 5%	83.34
arles Z. Merritt			2,500.00	None	5	5%	None	2,500.00 @ 5%	125.00
win C. Rudolph			2,500.00	None	5	5%	None	2,500.00 @ 5%	125.00
vid Brown			2,500.00	None	5	5%	None	2,500.00 @ 5%	125.00
on Dillon			2,500.00	None	5	5%	None	2,500.00 @ 5%	125.00
liam Mitchell			2,500.00	None	5	5%	None	2,500.00 @ 5%	125.00
n Gilcrest (out of employ)			Lapsed	.....	...	...	.....	.....	.....
arles Reddy			2,000.00	None	5	5%	None	2,000.00 @ 5%	100.00
nes Ogden (out of employ)			Lapsed	.....	...	...	.....	.....	.....
A. Leonard (out of employ)			Lapsed	.....	...	...	.....	.....	.....
W. Wallis (out of employ)			Lapsed	.....	...	...	.....	.....	.....
F. Ogle			1,000.00	None	5	5%	None	1,000.00 @ 5%	50.00
gh T. Gower			1,000.00	None	5	5%	None	1,000.00 @ 5%	50.00
arles Robinson (out of employ)			Lapsed	.....	...	...	.....	.....	.....
win M. Jordan			1,000.00	None	5	5%	None	1,000.00 @ 5%	50.00
ler Arbios (died before testator)			.....	.....	...	...	.....	.....	.....
ary Rader			500.00	None	5	5%	None	500.00 @ 5%	25.00
s. Henry Rader			500.00	None	5	5%	None	500.00 @ 5%	25.00
C. Safstrom			500.00	None	5	5%	None	500.00 @ 5%	25.00
rus R. Swift (out of employ)			Lapsed	.....	...	...	.....	.....	.....
njamin Miller			300.00	None	5	5%	None	300.00 @ 5%	15.00
s A. Lestine			300.00	None	5	5%	None	300.00 @ 5%	15.00
ary Pfeiffer			300.00	None	5	5%	None	300.00 @ 5%	15.00
s. Emil Marquardt (out of employ)			Lapsed	.....	...	...	.....	.....	.....
elsio Castro			250.00	None	5	5%	None	250.00 @ 5%	12.50
Rock Tofalo			250.00	None	5	5%	None	250.00 @ 5%	12.50
us Lopez			250.00	None	5	5%	None	250.00 @ 5%	12.50
is Gonzales			250.00	None	5	5%	None	250.00 @ 5%	12.50
y Taylor (out of employ)			Lapsed	.....	...	...	.....	.....	.....
liam Bedell			200.00	None	5	5%	None	200.00 @ 5%	10.00
M. Thomas			500.00	None	5	5%	None	500.00 @ 5%	25.00
V. Deeney			250.00	None	5	5%	None	250.00 @ 5%	12.50
C. Wilson			250.00	None	5	5%	None	250.00 @ 5%	12.50
chuca Higuerra (died before testator)			.....	.....	...	...	.....	.....	.....
n Francisco Home for Incurables			10,000	None, charity	5	5%	None	10,000.00 @ 5%	500.00
or of Gilroy			15,000.00	None, charity	5	5%	None	15,000.00 @ 5%	750.00
st English Evangelical Lutheran Church			5,000.00	None, charity	5	5%	None	5,000.00 @ 5%	250.00
or of Brackenheim			25,000.00	None, charity	5	5%	None	25,000.00 @ 5%	1,250.00

PAGE CUT OFF

RESIDUARY LEGATEES FOR LIFE.

Name	Age	Expectancy	Amount	Relation	Primary Class	Rate	Exemption	Rates			Tax
Nellie Miller Nickel (Born Aug. 13, 1865)	51	19.50	$169,656.62	Daughter	1	1½	$10,000	$ 15,000.00	@	1½	$ 150.00
								25,000.00	@	2½	500.00
								50,000.00	@	3½	1,500.00
								369,656.62	@	4½	14,426.26
J. Leroy Nickel (Born Jan. 25, 1851)	66	10.46	239,026.77	Son-in-law	2	2½	10,000	15,000	@	2½	300.00
								25,000.00	@	4½	1,000.00
								50,000.00	@	6½	3,000.00
								179,026.77	@	8½	10,102.14
George W. Nickel (Born Feb. 2, 1887)	30	31.43	93,843.41	Grandson	1	1½	10,000	15,000	@	1½	150.00
								25,000.00	@	2½	500.00
								43,843.41	@	3½	1,315.30
Beatrice Sarah Nickel (Born Dec. 5, 1893)	24	38.68	120,318.53	Granddaughter	1	1½	10,000	15,000	@	1½	150.00
								25,000.00	@	2½	500.00
								50,000.00	@	3½	1,500.00
								120,318.53	@	4½	813.94
J. Leroy Nickel (Born May 21, 1895)	21	39.79	119,203.15	Grandson	1	1½	10,000	15,000.00	@	1½	150.00
								25,000.00	@	2½	500.00
								50,000.00	@	3½	1,500.00
								19,203.15	@	4½	768.13
Sarah Miller Nickel	1	48.76	74,618.57	Great-granddaughter	1	1½	10,000	15,000.00	@	1½	150.00
								25,000.00	@	2½	500.00
								21,618.57	@	3½	738.56
											$10,514.33
Charities			18,078.41	None, charity	5	5½	None	18,078.41	@	5½	993.92
Total for residuary legatees for life			$1,116,775.46					$1,036,775.46			$41,418.25

RESUME.

	Amount	Tax
Specific legacies	$ 314,551.40	$ 6,731.53
Residuary legatees for life	1,098,697.05	40,514.33
Nellie Miller Nickel and J. Leroy Nickel, trustees for charity	18,078.41	903.92
Totals	$1,431,326.86	$48,149.78

(Endorsed): Filed Apr. 19, 1917.
E. H. BEEMER, Clerk.
By S. C. Foster,
Deputy Clerk.

1708 [Title of Court and Cause.]

OBJECTIONS TO APPRAISEMENT.

Now come the respondents in the above entitled action and proceeding and file their objections to the appraisement made and filed in the above entitled action and proceeding and now state the grounds of their objections thereto as follows, to wit:

1. That none of the property appraised in the said proceeding is taxable under the provi-
1709 sions of the Inheritance Tax Act of Nevada approved March 26th, 1913, and which went into effect on the 26th day of April, 1913, for the reason that said property and the whole thereof was transferred and delivered by the said Henry Miller prior to the date when the said act went into effect, to wit: upon the 17th day of April, 1913, and the said transfer is not taxable under the said act and the said act is not made retroactive so as to cover a transfer made
1710 prior to the date when the same went into effect, nor could the same be constitutionally made to apply to such a transfer.

2. In assessing the value of said property and in computing the tax thereon there should be deducted from the value of the said property such proportion of the indebtedness of the said Miller & Lux Incorporated as the value of the property of the said corporation within this state bears to the value of the entire property

1711 of the said Miller & Lux Incorporated in accordance with the provisions of section 24 of the said Inheritance Tax Act, and the final appraisement of the said property and the final fixing of the said tax should be delayed until the Superior Court of the City and County of San Francisco, State of California, having original jurisdiction of the probate of the will of Henry Miller, deceased, shall adjudge the true market value of the entire estate of said decedent
1712 and the indebtedness for which the said estate is liable, and shall duly attest to the same as provided by said section 24 of said Inheritance Tax Act.

3. That the said property does not constitute property within the State of Nevada subject to the provisions of the said Inheritance Tax Act of the State of Nevada, or taxable thereunder.

1713 4. And the said respondents hereby, as objections to the said appraisement, likewise rely upon and incorporate herein the allegations of their answer herein, and rely upon all the facts therein set forth as objections to the said appraisement.

Wherefore said respondents pray that the said objections be sustained and that it be adjudged that the said property is not subject to any tax under the said act, and that if it is held liable for any tax that there be deducted

1714 from the value of said property the debts and expenses properly chargeable against the said property.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Respondents.

(Endorsed): Filed this 27th day of March, 1917.

E. H. BEEMER, Clerk.

1715 Be it further remembered that the hearing of the said matter and the said objections came on regularly before the court, Hon. R. C. Stoddard, district judge, presiding; Messrs. George B. Thatcher, attorney general; E. F. Lunsford, district attorney of Washoe County, appearing for the petitioner; and Messrs. S. S. Downer, of the firm of Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, appearing for the respondents; and thereupon the following

1716 proceedings were had and taken:

The said petitioner introduced in evidence all of the record of the proceedings before the said William Blattner, inheritance tax appraiser, including the said inheritance tax appraisement, said transcript of proceedings before the inheritance tax appraiser, including the said last will and testament of Henry Miller, deceased (Respondents' Exhibit 1), deed of trust from Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as trustees (Respondents' Exhibit 3);

1717 proceedings before the inheritance tax appraiser in the matter of the estate of Henry Miller, deceased, in California (Petitioner's Exhibit "A"), list of land contracts (Petitioner's Exhibit "B"), and computation of tax (Petitioner's Exhibit "C").

It was thereupon stipulated that the said deed of trust, dated April 17th, 1913 (Respondents' Exhibit 3) was not filed for record in either
1718 or any of the counties of the State of Nevada, or with any of the county recorders or county officers of this state.

It was further stipulated that on the 13th day of April, 1913, certificate No. 114 of Miller & Lux Incorporated for one hundred and nineteen thousand, eight hundred thirty-nine and seventy-five one-hundredths (119,839.75) shares standing in the name of Henry Miller was transferred on
1719 the books of said corporation in the custody of the resident agent of the said corporation in Nevada, to wit: The State Agent and Transfer Syndicate Incorporated, to Nellie Miller Nickel and J. Leroy Nickel, as trustees.

It was thereupon further stipulated that the court can take the same notice of the statutes of California and the decisions of the courts of California as it might of the statutes and decisions of Nevada without any proof or testimony thereof.

1720 The foregoing is all of the evidence and proceedings had and introduced upon the trial of said action.

Thereupon the said matter was argued and submitted to the court, and thereafter and on the 7th day of June, 1917, the court, in the absence of the parties, filed its decision;

Thereafter and on the 16th day of June, 1917, the said court made and filed its findings of fact
1721 and conclusions of law;

Thereafter and on the 16th day of June, 1917, the respondents served and filed their notice of intention to move for a new trial;

Thereafter and on the 18th day of June, 1917, the respondents filed their exceptions to findings and request for additional findings;

Thereafter and on the 7th day of July, 1917, respondents duly presented to the court their
1722 motion for new trial, and moved said court for a new trial on the grounds specified in their notice of motion for new trial.

Thereafter and on the 7th day of July, 1917, the said court made and filed its order denying said motion for new trial, refusing the request for additional findings, refusing to correct the findings, and overruling exceptions to findings.

The papers and documents last above referred to are in the words and figures following, to wit:

1723 [Title of Court and Cause.]

OPINION AND ORDER.

Proceedings to determine the validity of a collateral inheritance tax claimed by the state controller to be due from certain beneficiaries under a deed of trust made by one Henry Miller, now deceased.

Henry Miller died October 14, 1916, being then over the age of 89 years. Nellie Miller Nickel
1724 is his only surviving child and is the wife of J. Leroy Nickel. Both are named as trustees and beneficiaries under the trust deed and will executed by the deceased on April 17, 1913, a few days before the statute hereinafter mentioned became effective.

At the time these instruments were executed by the deceased, he was an invalid under medical treatment for and afflicted with physical ailments from which he never recovered.

1725 The will was filed for probate with the clerk of the Superior Court of the City and County of San Francisco, State of California, on the 19th day of October, 1916. The trust deed was recorded in said county and state October 20, 1916. It had previously been kept in a safety deposit box, to which the trustees had exclusive access, and where it had reposed, together with the certificates of stock hereinafter mentioned, ever since its execution and delivery. On the day said will and deed were executed, the de-

ceased also indorsed and delivered to said trustees, 119,971.75 shares, being practically all of the capital stock of Miller & Lux, Incorporated, a Nevada corporation then and at the time of the institution of these suits owning and holding all of the shares of the capital stock of the Pacific Livestock Company, a California corporation, which appears to own and hold all the real and personal property situate within this state and which is claimed to be subject to the transfer tax imposed by the act of the legislature approved March 26, 1913, (Statutes, 1913, p. 411), sections one and five of which read as follows:

"Section 1. A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this state, and any interest therein or income therefrom, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, not hereinafter exempted, which shall pass in trust or otherwise by will or by the statutes of inheritance of this or any other state or by deed, grant, sale or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act. For the purposes of this act, the ownership of shares of stock in a corporation owning property in this state shall be considered as owner-

ship of such interest in the property so owned by such corporation, as the number of shares so owned shall bear to the entire issued and outstanding capital stock of such corporation; and notes and other evidences of indebtedness secured by mortgage on real estate situated in this state are and shall be, upon the owners' death, subject to the inheritance tax hereinafter provided."

"Sec. 5. When any grant, gift, legacy, devise or succession upon which a tax is imposed by section 1 of this act shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion, or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported or of which it is a part shall be appraised immediately after the death of the decedent and the market value thereof determined, in the manner provided in section 17 of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and together with the interest thereon, shall be and remain a lien on said property until the same is paid; provided, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax may elect not to pay the same until they shall come into

1732 the actual possession or enjoyment of such property; and in that case, such person or persons or body politic or corporate shall execute a bond to the State of Nevada in a penalty of twice the amount of the tax arising upon personal estate, such sureties as the district court having jurisdiction as hereinafter provided may approve, conditioned for the payment of said tax and interest thereon, at such time or period as they or their representatives may come into
1733 the actual possession or enjoyment of such property, which bond shall be filed in the office of the county clerk of the proper county and a certified copy thereof shall be immediately transmitted to the state controller; provided further, that such person shall make a full and verified return of such property to said court and file the same in the office of the county clerk within one year from the death of the decedent and within that period enter into such
1734 security and renew the same every five years."

It will be noted that the statute went into effect April 25, 1913, and is not by its express terms made retroactive. Hence, it must be construed as having only a prospective operation, as no intent to make the same operate retrospectively may be inferred from the words therein employed; therefore, if the interests in the property mentioned in the deed passed to and vested absolutely in the beneficiaries therein named upon the date of the execution and

delivery of the deed and independently of the death of Henry Miller, no tax may lawfully be imposed thereon. This proposition is not disputed by the State and is fully sustained in the cases cited by the trustees, in each one of which it appears, however, that the interest vested by reason of death, or otherwise, before the statutes under review were effective, the same not being retroactive. Inheritance tax statutes should be given a reasonable and liberal interpretation with a view to effectuate the intention of the legislature, and whatever some courts may have said on this question, they have, in fact generally given such statutes a liberal construction in favor of the government by subjecting to taxation every transfer that could be reasonably brought within the purview of the law. Ross Inheritance Taxation, sec. 35; Estate Gordon, 186 N. Y. 471, 79 N. E. 722, 10 L. R. A. 1089; State v. Bazille (Minn.), 106 N. W. 6 L. R. A. (N. S.) 732. The rights and obligations of all parties in regard to the payment of an inheritance tax are ordinarily determinable as of the time of the death of the decedent. Notes to English v. Crenshaw (Tenn.), 127 Am. St. Rep. 1053, Ann.

The will contains substantially the same provisions as the deed of trust and expressly directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified, which

are the same as specified in the deed, paragraph III of which contains the following provision:

"If any person to whom any sum of money is directed to be paid dies before the death of said party of the first part, such provision shall lapse except as otherwise provided herein. If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provision herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein."

It is manifest that Henry Miller did not completely divest himself of or relinquish control over the interests of the individual beneficiaries named in the instruments. Up to the time of his death he still retained and possessed the lawful right to effectively destroy, or at least, to render practically valueless, the interests of each of the individuals named as beneficiaries in said deed of trust. In order to attain this result it was only necessary for him to make another will revoking all former wills by him made,

and, by appropriate testamentary language direct his trustees therein named to pay the individual beneficiaries specified in said deed of trust one dollar or one cent, or any other nominal sum in satisfaction of the provisions contained in said deed, whereupon "such payment shall be deemed to be in satisfaction of the provision made for such party". The fact that he did not do so is immaterial. Whether the persons named would come into the possession or enjoyment of any tangible interest or property of value depended entirely upon the situation existing at the time of the death of Miller and not at the time of the execution and delivery of his deed of trust. Their respective interests were not fixed or determined until that event occurred. Prior to the death of the [illegible] the interests of the beneficiaries were not capable of any reasonably approximate valuation because the deceased reserved the right to effectively amend the deed, not directly, but by a will subsequently executed as heretofore indicated, and this reservation rendered the respective interests of the cesti quis of such uncertain quantum and value as to make them entirely dependent upon the will of the donor. In a recent New York case, the court, in dealing with a similar question, reaffirms the general principle of law to the effect that to constitute a valid gift *inter vivos* the donor must part with the possession of the property and divest himself of all owner-

1744 ship in or dominion over it, and it must be delivered to the donee. Re Hoyt's estate, 149 N. Y. Sup. 91, citing matter of Bolin, 136 N. Y. 177, 32 N. E. 626; Ganon v. McClure, 160 N. Y. 476, 55 N. E. 7, 73 Am. St. Rep. 694.

It was not, therefore, until the death of the settler without such testamentary amendment that the transfer in any respect became absolute and that the cesti quis became irrevocably entitled to the various sums mentioned in the
1745 deed which were intended to come out of the trust property. Re Hoyt, supra; Matter of Bostwick, 160 N. Y. 489, 55 N. E. 208. The case last mentioned seems to definitely settle the apparent conflict of decisions in New York upon the question of the taxability of trust funds created by deed similar to the one under consideration, as stated by the learned surrogate in Re Hoyt, supra. See also Re Schermmerhorn's Estate, 149 N. Y. Sup. 95. Practi-
1746 cally the same question is settled in a late Massachusetts case (Trust Co. v. Stevens, 95 N. E. 850) wherein the court says:

"It is the first contention of the appellants who are the beneficiaries under the trust that they are exempt as the transfer of the property in question became complete in the lifetime of the donor or settler. By the terms of the instrument creating the trust no power of revocation is reserved. The test, however, by which the exemption is to be ascertained does not depend

1747 upon whether a power to revoke has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferror. It is the absence of the power of control with the unrestricted right of the recipient to dispose of the property, and to receive and use the proceeds, which by the express language of the statute subjects it to the tax."

Under the facts herein, it is quite clear, as to
1748 the cesti quis the deceased intended that the possession and enjoyment of the property thus dealt with was to vest only upon his death and not before, and then only upon certain contingencies which might either totally defeat or render valueless their interests therein.

The consideration mentioned in the deed is ten dollars "and other good and valuable considerations." The statute requires that the transfer, in order to be exempt from taxation,
1749 must be for a *valuable* and *adequate* consideration. To have the benefits of the exemption the beneficiaries must bring themselves within its terms. The policy of the law is that the owner of property shall not defeat or evade the tax imposed by any form of conveyance or transfer, where after death the income or enjoyment enures to the benefit of those who are not exempted. Minot v. Winthrop, 162 Mass. 113, 38 N. E. 512, 26 L. R. A. 259; Emmons v. Shaw, (Mass.) 50 N. E. 1033; Trust Co. v. Stevens,

1750 95 N. E. 851; State v. Mollier (Kansas), 152 Pac. 771. The intention to evade may be apparent in the instrument, or it may be found when all the circumstances attending the transaction are disclosed. Trust Co. v. Stevens (Mass.), 95 N. E. 851, supra; 13 Cyc. 607, 622; Lamb's Est. v. Morrow, 117 N. W. 1118.

The relation of the parties to the deed here was that of donor and donees and not a contractual relation for a valuable and adequate
1751 consideration, and I am convinced by the evidence and the language of the document itself that the deed is testamentary in character, made in contemplation of death, and as to the donees or beneficiaries was intended to take effect in possession and enjoyment only upon the death of the decedent, and hence the transfer is subject to the succession tax imposed by the aforesaid act. It was the intention of the legislature to tax such a transfer, ~~even~~ though the
1752 deed was executed prior to the date the statute of 1913 became effective, and such intention is manifest from the language employed therein without making the statute operate restrospectively.

Crocker v. Shaw, 174 Mass 266, 54 N. E. 549; N. E. Trust Co. v. Abbott, 205 Mass. 279, 91 N. E. 379, 137 Am. St. Rep. 437; Matter of Brandeth, 169 N. E. 437, 62 N. E. 563, 58 L. R. A. 148; Estate of Green, 47 N. E. ~~893~~ 892; Etsate of Cornell, 63 N. E. 445; Estate of Cruger, 66

1753 N. Y. Sup. 636, 59 N. E. 1121; Re Moirs Estate (Ill.), 69 N. E. 905; People v. Kelley, (Ill.) 75 N. E. 1038; Re Kenneys Est., (N. Y.) 87 N. E. 428; Orr v. Gilman, 183 U. S. 278, 34 Law. Ed. 969; Moffitt v. Kelly (Cal.), 218 U. S. 400; Re Seamens Est. (N. Y.), 47 N. E. 292; Atty. Gen. v. Stone (Mass.), 95 N. E. 395; Chanler v. Kelsey, 27 Sup. Ct. 550, 51 Law. Ed. Reish v. Com., 106 Pa. 521; Seiberts Appeal, 110 Pa. 329, 1 Atl. 346.

1754 It is conceded by the attorney general and by counsel for the trustees that certain deductions should be made from the amount found by the inheritance tax appraiser to be due as a tax upon the property situated in Washoe and Humboldt Counties and that as so revised the following computations are correct:

Total valuation of property in Nevada:

Humboldt County,	$896,944.41
Washoe County,	187,217.45
1755 Lyon County,	347,165.00
Grand total,	$1,431,326.86

Being of the opinion that the transfer under consideration is subject to the tax imposed by the Act of March 26, 1913, the objections to the report of the inheritance tax appraiser will be overruled in case No. 12,086, and the court will find the total value of said property to be the sum of $1,431,326.86, and the total amount of the

1756 tax due herein to be the sum of $48,149.78, according to the following resume, as appears from Exhibit "C" in evidence:

RESUME.

	Amount	Tax
Specific legacies,	$ 314,551.40	$ 6,731.53
Residuary legatees for life,	1,098,697.05	40,514.33
Nellie Miller Nickel and J. Leroy Nickel,		
1757 trustees for charity,	18,078.41	903.92
Totals,	$1,431,326.86	$48,179.78

In case No. 12,103 judgment will be entered in favor of the State of Nevada. Each party hereto may have twenty days from date of notice hereof within which to present findings or to take such other steps in each case as may be deemed advisable and to file and serve cost bills and objections thereto, the court reserving for
1758 further consideration all questions pertaining thereto. It is so ordered.

Dated, June 7, 1917.

R. C. STODDARD,
District Judge.

(Endorsed): Filed Jun. 7, 1917.
E. H. BEEMER, Clerk.
By S. C. Foster,
Deputy Clerk.

1759 [Title of Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The above entitled cause coming on regularly for hearing on the 19th day of April, 1917, before the above entitled court, Honorable R. C. Stoddard, district judge, presiding, and the petitioner being represented by George B. Thatcher, attorney general of Nevada, and E. F. Lunsford, district attorney of Washoe County, and the respondents being represented by their at-
1760 torneys, Edward F. Treadwell and Cheney, Downer, Price & Hawkins, and evidence, oral and documentary, having been duly offered and presented by the respective parties, and the report of the appraiser, William Blattner, having been duly and regularly presented to the court for its adoption and approval, and the cause having been duly and regularly submitted to the court for its decision on the 15th day of June, 1917, and the above entitled court
1761 having filed its opinion and decision in favor of the petitioner on June 7, 1917,

Now, therefore, the court makes and adopts the following:

FINDINGS OF FACT.

The court finds that Henry Miller died October 14, 1916, being then over the age of eighty-nine years. Nellie Miller Nickel is his only surviving child, and is the wife of J. Leroy Nickel. That on April 17, 1913, Henry Miller, deceased, made, executed and delivered that cer-

1762 tain deed of trust, dated April 17, 1913, and recorded in book 972 of deeds (N. S.) page 170, of the county recorder's office of the City and County of San Francisco, a copy of said deed of trust is annexed to the petition in this action. That Nellie Miller Nickel and J. Leroy Nickel were designated as trustees under and by virtue of said deed of trust, and that the said trustees on the same day, to wit: April 17, 1913, accepted the said trust, by an endorsement in
1763 writing thereon, duly signed and acknowledged by them, which is likewise made a part of the petition herein. That on the same day said Henry Miller, deceased, duly and regularly executed his last will and testament, a copy of which is attached to the petition and made a part thereof. That at the time the said deed of trust and said will were executed by the deceased, Henry Miller, he was an invalid, under medical care and treatment, and afflicted with
1764 physical ailments from which he never recovered. That said trust deed was recorded in the City and County of San Francisco, October 20, 1916. That said deed of trust was never recorded or placed of record in the State of Nevada, or any of the Counties thereof. That prior to October 20, 1916, said trust deed had been kept in a safety deposit box, to which the trustees, J. Leroy Nickel and Nellie Miller Nickel, had exclusive access. That in the same safety deposit box there was deposited on or about April 17, 1913,

1765 certificates of stock of Miller & Lux Incorporated, which said certificates of stock were endorsed, assigned, transferred and delivered by the said Henry Miller to said trustees on the same day as the execution of said deed of trust, and represented $119,871.75 shares, out of 120,000 shares, the total capital stock of Miller & Lux Incorporated, a Nevada corporation. That at said time, and ever since, Miller & Lux Incorporated owned and held all of the shares
1766 of the capital stock of the Pacific Live Stock Company, a California corporation. That the Pacific Live Stock Company owns real and personal property situate within the State of Nevada, and in the Counties of Humboldt, Washoe and Lyon. That said real and personal property, so owned by the Pacific Live Stock Company, is of an aggregate value of $1,431,326.86, $896,944.41 of which is in Humboldt County, $187,217.45 of which is in Washoe
1767 County, and $347,165.00 of which is in Lyon County. That said deed of trust, so executed and delivered by Henry Miller on the 17th day of April, 1913, did not completely divest said Henry Miller, nor did he thereby relinquish, control over the interest of the individual beneficiaries named in the instrument, or of the vesting of the property therein described. That by the terms of said deed of trust said Henry Miller, deceased, retained and possessed the right to effectively destroy, or to render practi-

cally valueless, the interest of each and every donee, as such, thereunder, reserving unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament. That by said deed of trust the persons named as beneficiaries, or as trustees, thereunder, did not come into the possession or enjoyment of any tangible interest or property, but the possession and enjoyment thereof, and of the property designated, named and covered by said deed of trust, was postponed to and depended entirely upon the situation and conditions existing at the time of the death of Henry Miller, deceased, and not at the time of the execution and delivery of said deed of trust. That the interest of the trustees and of the beneficiaries in said deed of trust was not vested or fixed or determined until that event occurred.

That the consideration named in the deed of trust is ten ($10) dollars. That no valuable or adequate consideration passed for the making and execution of said deed. That there was no valuable or adequate consideration for the making and execution of said deed. That said deed of trust was made, executed and delivered with the express purpose and intention, on the part of Henry Miller, deceased, to evade the inheritance tax laws of this state, and particularly the provisions of "An act to provide revenue for the support of the government of

the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devisees, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising thereunder," approved March 26, 1913, which said act, by its terms thereof, became effective on the 25th day of April, 1913. That the will contains substantially the same provisions as the deed of trust, and expressly directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified, which are the same as specified in the deed. That said deed of trust is testamentary in character, made in contemplation of death, and as to the donees or beneficiaries, was intended to take effect in possession and enjoyment only upon the death of decedent. That the aggregate value of the amounts directed to be paid by said deed of trust is $314,551.40; that the tax due thereon is $6,731.53. That the aggregate value of the residuary estates is $1,098,697.05, and that the amount of the tax thereon is $40,514.33. That the aggregate value of the amounts directed to be paid by Nellie Miller Nickel and J. LeRoy Nickel, trustees for charitable purposes, is $18,078.41 and the amount of tax due thereon is $903.92. That the total amount of taxes due to the State of Nevada is $48,149.78.

That the aforementioned deed of trust made and executed by Henry Miller was made and executed without any valuable or adequate consideration, in contemplation of death of the grantor, and intended to take effect in possession or enjoyment at or after the death of said Henry Miller, so far as the beneficiaries, other than said Miller, are concerned, and within the meaning of: "An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devisees, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising thereunder," approved March 26, 1913.

That said Henry Miller died on the 14th day of October, 1916, and at the time of his death was a resident of the City and County of San Francisco, State of California.

That said transfer by said deed of trust, and the several interests and estates passing thereunder and thereby were, and are, subject to the inheritance taxes under the act aforesaid, and said taxes are a lien upon said shares of stock so transferred by said deed of trust, and the amount of said taxes due upon said transfer and upon the several rights conferred thereby are as follows, to wit:

1777	Sarah E. Miller	$1,300.00
	Minnie Pfeiffer Sheldon	101.50
	Sarah Long Brown	6.31
	Nellie Long Whittington	41.25
	Nancy Prolasco	750.00
	Anna Sibley Robinson	129.97
	Joseph Place	250.00
	Dorothy Otto	50.00
	Henry Brem	83.33
	George Brem	83.33
1778	Richard Brem, Jr.	83.34
	Charles Z. Merritt	125.00
	Edwin C. Rodolph	125.00
	David Brown	125.00
	John Dillon	125.00
	William Mitchell	125.00
	Charles Reddy	100.00
	E. F. Ogle	50.00
	Hugh T. Gower	50.00
	Edwin M. Jordan	50.00
1779	Henry Bader	25.00
	Mrs. Henry Bader	25.00
	H. C. Safstrom	25.00
	Benjamine Miller	15.00
	Gus A. Lestine	15.00
	Henry Pfeiffer	15.00
	Nacisio Castro	12.50
	J. Rock Tofalo	12.50
	Jesus Lopez	12.50
	Louis Gonzales	10.00
	William Bedell	10.00

1780	M. M. Thomas	25.00
	M. V. Deeney	12.50
	M. C. Wilson	12.50
	San Francisco Home for Incurables	500.00
	Poor of Gilroy	750.00
	First English Evangelical Lutheran Church	250.00
	Poor of Brockenheim	1,250.00
	Nellie Miller Nickel	16,576.26
	J. Leroy Nickel	14,702.14
1781	George W. Nickel	1,965.20
	Beatrice Sarah Nickel	2,963.94
	J. Leroy Nickel	2,018.13
	Sarah Miller Nickel	1,388.56
	J. Leroy Nickel and Nellie Miller Nickel, trustees for charities	903.92
		$48,149.78

1782 That said shares of stock are subject to a lien in favor of the State of Nevada in the aggregate sum of $48,149.78, together with such interest and penalties as may be imposed thereon by the terms and conditions of said act.

Conclusions of Law.

As conclusions of law from the foregoing facts, the court finds and decides that petitioner, the State of Nevada, is entitled to judgment herein in the sum of $48,149.78 against the several rights and persons heretofore in details

1783 specifically set out, and that the several rights and estates created by said deed of trust and by the said last will and testament of Henry Miller, deceased, are subject to the tax aforesaid, in the amounts fixed respectively in the findings of fact herein.

Let judgment be entered accordingly.

Dated this 15th day of June, 1917.

R. C. Stoddard,

District Judge.

1784 (Endorsed): Filed Jun. 15, 1917.

E. H. Reemer, Clerk.

[Title of Court and Cause.]

Exceptions to Findings and Requests for Additional Findings.

Now come the respondents in the above entitled action and except to the findings of fact
1785 and conclusions of law therein, and to defects in the findings therein and to the want of findings therein as follows, to wit:

1. They except to the finding "That said deed of trust so executed and delivered by Henry Miller on the 17th day of April, 1913, did not completely divest said Henry Miller, nor did he thereby relinquish, control over the interest of the individual beneficiaries named in the instrument, or of the vesting of the property

1786 therein described," on the ground that the same is unsupported by the evidence and is contrary to the finding that the said deed of trust was made, executed and delivered by the said Henry Miller.

2. They except to the finding "That by the terms of said deed of trust said Henry Miller, deceased, retained and possessed the right to effectively destroy, or to render practically valueless, the interest of each and every donee
1787 as such thereunder, reserving unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament," on the ground that the same is unsupported by the evidence, is contrary to the terms of said deed of trust and is contrary to the finding that the same was made, executed and delivered by the said Henry Miller.

3. They except to the finding "That by said deed of trust the persons named as beneficiaries,
1788 or as trustees, thereunder, did not come into the possession or enjoyment of any tangible interest or property, but the possession and enjoyment thereof, and of the property designated, named and covered by said deed of trust, was postponed to and depended entirely upon the situation and conditions existing at the time of the death of Henry Miller, deceased, and not at the time of the execution and delivery of said deed of trust" on the ground that the same

1789 is not supported by the evidence and is not supported by the terms of the said deed of trust and is a conclusion of law and not a finding of fact.

4. They except to the finding "That the interest of the trustees and of the beneficiaries in said deed of trust was not vested or fixed or determined until that event occurred" on the ground that the same is not supported by the evidence nor by the said deed of trust and
1790 that the same is a conclusion of law and not a finding of fact.

5. They except to the finding "That said deed of trust was made, executed and delivered with the express purpose and intention, on the part of Henry Miller, deceased, to evade the inheritance tax laws of this state," on the ground that the same is not supported by the evidence but on the contrary at the time of the execution thereof there was no inheritance tax law of said
1791 state in force or in any way effective.

6. They except to the finding "That the will contains substantially the same provisions as the deed of trust, and expressly directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified, which are the same as specified in the deed," on the ground that the same is not sustained by the evidence but the amounts directed to be paid by the will were directed to be paid from such

1792 estate as the said Henry Miller might have at the time of his death, while the amounts directed to be paid by said deed of trust were directed to be paid from the proceeds of the sale of the property described therein.

7. They except to the finding "That said deed of trust is testamentary in character, made in contemplation of death, and as to the donees or beneficiaries, was intended to take effect in possession and enjoyment only upon the death
1793 of decedent "on the ground that the same is not supported by the evidence or by the said deed of trust.

8. They except to the finding "That the total amount of taxes due to the State of Nevada is $48,149.78", on the ground that the same is not sustained by the evidence, is a conclusion of law and no amount is due to the State of Nevada thereon.

1794 9. They except to the finding "That the aforementioned deed of trust made and executed by Henry Miller was made and executed without any valuable or adequate consideration, in contemplation of death of the grantor, and intended to take effect in possession or enjoyment at or after the death of said Henry Miller, so far as the beneficiaries other than said Miller, are concerned, and within the meaning of 'An act to provide revenue for the support of the

1795 government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devisees, successions and transfer, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising thereunder,' approved March 26, 1913" for the reason that the said deed of trust was made, executed and delivered prior to the said act taking effect and
1796 was not a transfer covered by the provisions of said Act, and the said finding is unsupported by evidence.

10. They except to the finding "That said transfer by said deed of trust, and the several interests and estates passing thereunder and thereby were, and are, subject to the inheritance taxes under the act aforesaid, and said taxes are a lien upon said shares of stock so transferred by said deed of trust," on the ground that the
1797 same is a conclusion of law and is not sustained by the evidence or the law.

11. They except to the finding fixing the amount of taxes due upon said transfer and upon the several rights conferred thereby and set forth in said findings, on the ground that same is not sustained by the evidence, and said amounts are not due as taxes upon said transfer, nor are any amounts due as taxes thereon, for the reason that said transfer was made and

1798 the estates vested prior to the taking effect of said inheritance tax act.

12. They except to the finding "That said shares of stock are subject to a lien in favor of the State of Nevada in the aggregate sum of $48,149.78, together with such interest and penalties as may be imposed thereon by the terms and conditions of said act," on the ground that the same is not sustained by the evidence nor by the law.

1799 13. Said respondents hereby request the court to make the following additional finding, to wit, "That on the 17th day of April, 1913, said Henry Miller was the owner and entitled to the possession and in the possession of said 119,871.75 shares of the capital stock of Miller & Lux Incorporated, a corporation organized and existing under the laws of the State of Nevada, and doing business in the States of Nevada, California, Oregon and elsewhere.

1800 14. Said respondents hereby request the court to make the following additional finding, to wit: That on the 17th day of April, 1913, the respondents became and ever since have been and now are the owners of said shares of stock and entitled to the possession thereof and in the actual possession of the same.

15. Said respondents hereby request the court to make the following additional finding, to wit: That all of the said shares of stock

vested in the said trustees and the interests of the several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective and that the same were not subject to an inheritance tax or a transfer tax under the provisions of the said act and that said act was not retroactive and did not intend to tax a transfer which took place before the effective date of the said act and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the respondents and of the beneficiaries under said deed of trust without due process of law, in violation of the 14th amendment to the constitution of the United States, and would take the property of the respondents and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the 14th amendment to the constitution of the United States; that the same would deny to the respondents and to the beneficiaries under said deed of trust the equal protection of the laws, in violation of the 14th amendment to the constitution of the United States and impair the obligation of contracts, in violation of section 10 of article I of the constitution of the United States and deprive the respondents and the beneficiaries under said deed of trust of their property without due

process of law, in violation of section 8 article I of the constitution of the State of Nevada, and would take private property, to wit, the property and rights transferred to respondents and to the beneficiaries under said deed of trust, for a public use without just compensation having been first made or secured, in violation of section 8 of article I of the constitution of the State of Nevada, and would impair the obligation of contracts in violation of section 15 of article V of the constitution of the State of Nevada, and would constitute a property tax as distinguished from a transfer tax, and not levied uniformly and equally upon all the property of the said State of Nevada, in violation of section 1 of article X of the constitution of the State of Nevada.

16. Said respondents hereby request the court to make the following additional finding, to wit: That the claim of the petitioner to a lien upon the said property is without right and that the said petitioner has no right, title, interest or estate in or lien upon the said property, or any part thereof.

17. Said respondents hereby request the court to make the following additional finding, to wit: That at the time of the death of the said Henry Miller, the said Henry Miller owned no property whatever situate within the State of Nevada and owned none of the property described in the complaint herein, but the said

1807 Henry Miller transferred and conveyed all of the said property to the said trustees by the said deed of trust on the 17th day of April, 1913, and at the time of his death he left no property within the jurisdiction of the State of Nevada subject to said inheritance tax over and above exemptions allowed by law or otherwise.

Wherefore, said respondents pray that the said defects be corrected and the said additional
1808 findings made and that its exceptions be allowed and settled.

EDW. F. TREADWELL,
CHENEY, DOWNER, PRICE & HAWKINS,
Attorneys for Respondents.

(Endorsed): Service of the within by copy admitted Jun. 18, 1917.

G. B. THATCHER and
E. F. LUNSFORD,
Attorneys for Plaintiff.

1809 Filed this 18th day of June, 1917.
E. H. BEEMER, Clerk.

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL.

To the above named petitioner, George A. Cole, as state controller of the State of Nevada, and to Hon. Geo. B. Thatcher, and Hon. E. F. Lunsford, his attorneys:

Please take notice that the respondents in the above entitled action intend to move for a new

1810 trial of said action, and to vacate the decision of the court in the above entitled action, for the following causes, materially affecting the substantial rights of such parties:

1. Insufficiency of the evidence to justify the decision.

2. That the decision is against law.

Said action will be made upon the minutes of the court.

EDW. F. TREADWELL,

1811 CHENEY, DOWNER, PRICE & HAWKINS,

Attorneys for Respondents.

(Endorsed): Service of the within by copy admitted June 16, 1917.

EDWARD F. LUNSFORD and
GEO. B. THATCHER,
Attorneys for Petitioner.

Filed this 16 day of June, 1917.
E. H. BEEMER, Clerk.
1812 S. C. Foster, Deputy.

[Title of Court and Cause.]

MINUTE ORDER DENYING A NEW TRIAL.

The above entitled action coming on regularly for hearing, the plaintiff by his attorney Harry V. Price, Esq., deputy attorney general, and the defendants, by their attorney, S. S. Downer, Esq., being present in court.

1813 Defendant at this time moved for a new trial in accordance with notice of motion heretofore filed and served in the above entitled action. The motion being submitted and the court being fully advised in the premises, ordered that the motion be denied.

Exception noted for defendant.

Defendant moved to adopt the proposed findings heretofore filed on June 18, 1917, and presented; ordered that the motion be denied.

1814 Exception noted for defendant.

The respondents duly excepted to the decision, findings of fact and conclusions of law, to the order of the court denying said motion for new trial, refusing the request for additional findings, refusing to correct the findings, and overruling respondents' exceptions to findings, which

1815 exceptions were duly allowed by the court.

Respondents now specify the following particulars in which the evidence is insufficient to justify the findings:

1. The evidence is insufficient to justify the finding "That said deed of trust so executed and delivered by Henry Miller on the 17th day of April, 1913, did not completely divest said

1816 Henry Miller, nor did he thereby relinquish control over the interest of the individual beneficiaries named in the instrument, or of the vesting of the property therein described".

2. The evidence is insufficient to justify the finding "That by the terms of said deed of trust said Henry Miller, deceased, retained and possessed the right to effectively destroy, or to render practically valueless, the interest of each and every donee as such thereunder, reserving
1817 unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament".

3. The evidence is insufficient to justify the finding "That by said deed of trust the persons named as beneficiaries or as trustees, thereunder, did not come into the possession or enjoyment of any tangible interest or property, but the possession and enjoyment thereof, and of the property designated, named and covered
1818 by said deed of trust, was postponed to and depended entirely upon the situation and conditions existing at the time of the death of Henry Miller, deceased, and not at the time of the execution and delivery of said deed of trust".

4. The evidence is insufficient to justify the finding "That the interest of the trustee and of the beneficiaries in said deed of trust was not vested or fixed or determined until that event occurred".

1819 5. The evidence is insufficient to justify the finding "That said deed of trust was made, executed and delivered with the express purpose and intention, on the part of Henry Miller, deceased, to evade the Inheritance Tax Laws of this state".

6. The evidence is insufficient to justify the finding "That the will contains substantially the same provisions as the deed of trust and expressly directs the trustees of the trust estate
1820 to pay the beneficiaries the amounts therein specified, which are the same as specfied in the deed".

7. The evidence is insufficient to justify the finding "That said deed of trust is testamentary in character, made in contemplation of death, and as to the donees or beneficiaries, was intended to take effect in possession and enjoyment only upon the death of decedent".

1821 8. The evidence is insufficient to justify the finding "That the total amount of taxes due to the State of Nevada is $48,149.78", or any other sum.

9. The evidence is insufficient to justify the finding "That the aforementioned deed of trust made and executed by Henry Miller was made and executed without any valuable or adequate consideration in contemplation of death of the grantor, and intended to take effect in possession or enjoyment at or after the death of said

Henry Miller, so far as the beneficiaries other than said Miller are concerned, within the meaning of 'An Act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devisees, successions and transfer, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising thereunder', approved March 26, 1913".

10. The evidence is insufficient to justify the finding "That said transfer by said deed of trust, and the several interests and estate passing thereunder and thereby were, and are, subject to the inheritance taxes under the act aforesaid, and said taxes are a lien upon said shares of stock so transferred by said deed of trust".

11. The evidence is insufficient to justify the finding that the several amounts set forth in said findings, or any thereof, are due as inheritance taxes upon the several rights conferred thereby and set forth in said findings.

12. The evidence is insufficient to justify the finding "That said shares of stock are subject to a lien in favor of the State of Nevada in the aggregate sum of $48,149.78, together with such interest and penalties as may be imposed thereon by the terms and conditions of said act".

1825 And respondents now specify the following particulars in which the decision is against law:

1. In this, that the said court held that the estates vesting by the said deed of trust prior to the date upon which the said inheritance tax law became effective were subject to the said law and to the taxes imposed thereby.

2. In this, that the said court held that under the terms of the said deed of trust the said Henry Miller retained and possessed the
1826 right to destroy or to render practically valueless the interest of each and every donee as such thereunder, reserving unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament.

3. In this, that the court held that the said beneficiaries and trustees under said deed of trust did not come into the possession or enjoyment of any tangible interest or property until
1827 after the death of Henry Miller.

4. In this, that the court held that the interest of the beneficiaries and trustees under said deed of trust were dependent upon the situations and conditions existing at the time of the death of Henry Miller, deceased, and not at the time of the execution and delivery of said deed of trust.

5. In this, that the court held that the interest of the said trustees and the beneficiaries

1828 in said deed of trust was not vested or fixed or determined until after the death of Henry Miller.

6. In this, that the said court held that the said deed of trust was testamentary in character.

7. In this, that the said court held that the said deed of trust with the interests vesting thereby were subject to the inheritance tax act aforesaid.

1829

8. In this, that all of the findings above mentioned are inconsistent with the finding that the said Henry Miller made, executed and delivered the said deed of trust.

9. In this, that all of the findings above mentioned are inconsistent with the finding that the said trustees under the said deed of trust are the owners of the said property.

10. In this, that the said court failed to find
1830 that on the 17th day of April, 1913, the said Henry Miller was the owner and entitled to the possession, and in the possession of said 119,871.75 shares of the capital stock of Miller & Lux Incorporated.

11. In this, that the said court failed to find that upon the 17th day of April, 1913, the respondents became and ever since have been and now are the owners of said shares of stock and entitled to the possession thereof, and in the actual possession of the same.

1831 12. In this, that the court failed to find that all of said shares of stock vested in said trustees and the interests of said several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective, and that the same were not subject to the inheritance tax or transfer tax under the provisions of the said act, and that
1832 said act was not retroactive, and did not intend to tax the transfer which took place before the effective date of the said act, and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the respondents and of the beneficiaries under said deed of trust without due process of law, in violation of the 14th amendment to the Constitution of the United States, and would take the property of the
1833 respondents and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the 14th amendment to the Constitution of the United States; that the same would deny to the respondents and to the beneficiaries under said deed of trust the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States, and impair the obligation of contracts, in violation of section 10 of Article I of the Constitution of the United States, and

1834 deprive the respondents and the beneficiaries under said deed of trust of their property without due process of law, in violation of section 8, Article I of the Constitution of the State of Nevada, and would take private property, to wit: the property and rights transferred to respondents and to the beneficiaries under said deed of trust for a public use without just compensation having been first made or secured, in violation of section 8 of Article I of the Constitution of
1835 the State of Nevada, and would impair the obligation of contracts in violation of section 15 of Article V of the Constitution of the State of Nevada, and would constitute a property tax as distinguished from a transfer tax, and not levied uniformly and equally upon all the property of the said State of Nevada, in violation of section 1 of Article X of the Constitution of the State of Nevada.

13. In that the court failed to find that the
1836 claim of the petitioner to a lien upon the said property is without right, and that the petitioner has no right, title, interest or estate in or lien upon the said property, or any part thereof.

14. In that the said court failed to find that at the time of the death of the said Henry Miller the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in the complaint herein, but the said Henry Miller transferred and conveyed all of the said prop-

erty to the said trustees by the said deed of trust on the 17th day of April, 1913, and at the time of his death he left no property within the jurisdiction of the State of Nevada, subject to said inheritance tax over and above exemptions allowed by law or otherwise.

Now, therefore, to the end that the foregoing may be and remain of record, the respondents present this, their bill of exceptions and statement, to be used on appeal, and request that the same be settled and allowed.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Respondents.

The foregoing bill of exceptions and statement on appeal are correct and may be settled.

GEO. B. THATCHER,
E. F. LUNSFORD,
Attorneys for Petitioner.

The foregoing bill of exceptions and statement on appeal, having been duly presented within the time allowed by law, the same is hereby settled and allowed this 4th day of September, 1917.

R. C. STODDARD,
District Judge.

1840 (Endorsed): Filed Sept 4, 1917.
E. H. Beemer, Clerk.
By J C Foster.
Deputy Clerk.

[Title of Court and Cause.]

JUDGMENT AND DECREE.

The above cause coming on regularly for hearing on the 19th day of April, 1917, before the
1841 above entitled court, Honorable R. C. Stoddard, District Judge, presiding, and the petitioner being represented by George B. Thatcher, Attorney General of Nevada, and E. F. Lunsford, District Attorney of Washoe County, and the respondents being represented by their attorneys, Edward F. Treadwell and Cheney, Downer, Price & Hawkins, and the report of the appraiser, William Blattner, having been duly and regularly presented to the court for its adoption
1842 and its approval, and oral and documentary evidence having been duly offered and presented by the respective parties, and the cause having been duly and regularly submitted to the court for its decision on the 15th day of June, 1917, and the above entitled court having filed its opinion and decision in favor of the petitioner on June 7, 1917, and the said court having thereafter, and on the 15th day of June, 1917, duly and regularly made its findings of fact and conclusions of law in favor of petitioner, and

1843 having therein modified the report of the appraiser, and fixed the aggregate value of real and personal property subject to inheritance tax in the State of Nevada at $1,431,326.86, $896,944.41 of which is in Humboldt County, $187,217.45 of which is in Washoe County, and $347,165 of which is in Lyon County, and, as so modified, having approved the report of said appraiser, and said court having found that the aggregate amount of inheritance tax due to be
1844 the sum of $48,149.78, and the court, in its conclusions of law, having ordered that as so modified said appraisement be approved;

Now, therefore,

It is ordered, adjudged and decreed that the appraisement made by William Blattner, appraiser, in the above entitled matter, be by this court hereby approved and confirmed, upon the following valuations of property lying, being and situate within the State of Nevada, in the sum
1845 of $1,431,326.86, $896,944.41 of said valuation lying and being in Humboldt County, Nevada, $187,217.45 of said valuation lying and being in Washoe County, Nevada, and $347,165. of said valuation lying and being in Lyon County, Nevada;

And be it further ordered, adjudged and decreed that the aggregate amount of inheritance tax due, and which shall, and is hereby made a lien against all property of said estate in the hands of the trustees thereof, or in the possession

1846 of Nellie Miller Nickel and J. Leroy Nickel, trustees, under that certain deed of trust, dated April 17, 1913, is the sum of $48,149.78, and that the amount of said taxes due upon said transfer, and upon the several rights conferred thereby and thereunder are as follows, to wit:

	Sarah E. Miller	$1,300.00
	Minnie Pfeiffer Sheldon	101.50
	Sarah Long Brown	6.31
	Nellie Long Whittington	41.25
1847	Nancy Probasco	750.00
	Anna Sibley Robinson	129.97
	Joseph Place	250.00
	Dorothy Otto	50.00
	Henry Brem	83.33
	George Brem	83.33
	Richard Brem, Jr.	83.34
	Charles Z. Merritt	125.00
	Edwin C. Rodolph	125.00
	David Brown	125.00
1848	John Dillon	125.00
	William Mitchell	125.00
	Charles Reddy	100.00
	E. F. Ogle	50.00
	Hugh T. Gower	50.00
	Edwin M. Jordan	50.00
	Henry Bader	25.00
	Mrs. Henry Bader	25.00
	H. C. Safstrom	25.00
	Benjamin Miller	15.00
	Gus A. Lestine	15.00

1849	Henry Pfeiffer	15.00
	Nacisio Castro	12.50
	J. Rock Tofalo	12.50
	Jesus Lopez	12.50
	Louis Gonzales	10.00
	William Bedell	10.00
	M. M. Thomas	25.00
	M. V. Denney	12.50
	M. C. Wilson	12.50
	San Francisco Home for Incurables	500.00
1850	Poor of Gilroy	750.00
	First English Evangelical Lutheran Church	250.00
	Poor of Brockenheim	1,250.00
	Nellie Miller Nickel	16,576.26
	J. Leroy Nickel	14,702.14
	George W. Nickel	1,965.30
	Beatrice Sarah Nickel	2,963.94
	J. Leroy Nickel, Jr.	2,918.13
	Sarah Miller Nickel	1,388.56
1851	J. Leroy Nickel and Nellie Miller Nickel, trustees for charities	903.92
		$48,149.78

And be it further ordered, adjudged and decreed, that said J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said

trustees, shall, within eighteen months from the death of the decedent, Henry Miller, pay such tax to the State of Nevada, and to the respective counties thereof, as follows:

The State of Nevada, to be divided equally between the State School Fund and the General Fund of the State	$38,519.80
County of Humboldt	6,034.63
County of Washoe	1,259.60
County of Lyon	2,335.72

It is further ordered, adjudged and decreed, unless said amount and the whole thereof be paid within eighteen months from the death of decedent, to wit: October 14, 1916, or unless bond in the form and effect prescribed by section 5 of Chapter 266, of the Statutes of Nevada, 1913, be given action shall be commenced in the name of the State of Nevada, as plaintiff, for the recovery of such tax and for the enforcement of the lien against the property in the hands of said trustees, or any successor in interest, and for the recovery of such penalties and interest as are provided by law.

Dated, this 7th day of July, 1917.

R. C. Stoddard,
District Judge.

(Endorsed): Filed Jul. 7, 1917.

E. H. Beemer,
Clerk.

1855 Recorded in judgment record, book N, pages 330-31.

E. H. Beemer,
County Clerk.
By G. R. Ellithorpe,
Deputy.

[Title of Court and Cause.]

NOTICE OF APPEAL.

1856 To the petitioner in the above entitled action and proceeding and to Hon. George B. Thatcher, attorney general, and E. F. Lunsford, district attorney, attorneys for petitioner:

You and each of you will please take notice that the respondents in the above entitled action and proceeding hereby appeal to the Supreme Court of the State of Nevada from the final order, judgment and decree of the district court of the State of Nevada in and for the County
1857 of Washoe, made in the above entitled action and proceeding, and from the order of said court denying the motion of the said respondents for a new trial therein, and from the whole of the said order, judgment and decree.

Dated, Reno, Nevada, July 7th, 1917.

Edward F. Treadwell,
Cheney, Downer, Price & Hawkins,
Attorneys for Respondents.

(Endorsed): Filed this 7th day of July, 1917.
E. H. Beemer, Clerk.

1858 [Title of Court and Cause.]

ADMISSION OF SERVICE
OF NOTICE OF APPEAL.

We hereby acknowledge due service of notice of appeal by the respondents in the above entitled action from the order, judgment and decree in said cause, and from the order denying respondents' motion for a new trial therein, by service of a copy of said notice of appeal after filing, and upon the 7th day of July, 1917.

1859

GEO. B. THATCHER,
E. F. LUKEFORD,
Attorneys for Petitioner.

(Endorsed): Filed this 7th day of July, 1917.
E. H. BEEMER,
Clerk.

[Title of Court and Cause.]

1860

UNDERTAKING ON APPEAL.

Whereas the respondents in the above entitled action and proceeding are about to appeal to the Supreme Court of the State of Nevada from the final order, decree and judgment therein, and from the order of the court denying their motion for new trial therein;

Now, therefore, we, the undersigned, H. G. Humphrey and W. H. Moffat, as sureties, being residents, householders and freeholders of the State of Nevada, and being by occupation cattle

1861 raisers, and residents of the City of Reno, State of Nevada, are held and firmly bound unto the plaintiff in the above entitled action in the sum of three hundred dollars ($300) gold coin of the United States of America, for which payment well and truly to be made we, and each of us, jointly and severally, are bound firmly by these presents.

The condition of the foregoing obligation is such that if the said respondents shall pay all
1862 damages and costs which may be awarded against them or any of them on the said appeals, or either thereof, not exceeding three hundred dollars, this obligation shall be void, otherwise to remain in full force and effect.

And whereas the said respondents desire a stay of execution of the said judgment and order pending said appeal;

Now, therefore, these presents further witnesseth:

1863 That the undersigned, as such sureties, are further held and firmly bound unto the said plaintiff in the sum of one hundred thousand dollars ($100,000) gold coin of the United States of America, being more than double the amount of the said judgment and order so appealed from, for which payment well and truly to be made we and each of us bind ourselves, jointly and severally, firmly by these presents.

The condition of the foregoing obligation is such that if the said appellants and the said

sureties shall pay the amount of tax for which the property involved in said action may be liable with cost of appeal, and if the judgment or order appealed from, or any part thereof, be affirmed or such appeals, or either thereof, be dismissed, the appellants shall pay the amount directed to be paid by the said judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants on the appeals, and that if the appellants do not make such payment within thirty (30) days after the filing of the remittitur of the Supreme Court, in the court for which the appeal is taken, judgment may be entered on motion of petitioner, in his favor, against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellants upon the appeal, then these presents shall be void, otherwise to remain in full force and effect.

In witness whereof we have hereunto set our hands and seals this 7th day of July, 1917.

H. G. Humphrey (Seal)
W. H. Moffat (Seal)

State of Nevada,
County of Washoe.—ss.

H. G. Humphrey and W. H. Moffat, sureties in the foregoing undertaking, being first duly

1867 sworn, each for himself deposes and says: that they are each worth the sum specified in the said undertaking over and above all their just debts and liabilities, exclusive of property exempt from execution.

H. G. HUMPHREY,
W. H. MOFFAT.

Subscribed and sworn to before me this 7th day of July, 1917.

(Seal) J. H. CLEMONS,

1868 Notary Public in and for the County of Washoe, State of Nevada.

State of Nevada,
County of Washoe.—ss.

The foregoing bond having been duly presented to me, the same is hereby approved.

In witness whereof I have hereunto set my hand and seal this 7th day of July, 1917.

E. H. BEEMER,
County Clerk.

1869

(Endorsed): Filed this 7th day of July, 1917.

E. H. BEEMER,
Clerk.

1870 *In the Supreme Court of the State of Nevada.*

George A. Cole, as State Controller of the State of Nevada,
Respondent,
vs.
J. Leroy Nickel and Nellie Miller Nickel, Trustees, etc., et al.,
Appellants.

1871

ASSIGNMENT OF ERRORS

Now come the appellants in the above entitled cause and file the following assignment of errors therein, on which they will rely upon their appeal in the above entitled cause.

I. The court erred in holding that the inheritance tax law of 1913 had any application to the deed of trust made, executed and delivered by Henry Miller on the 17th day of April, 1913,
1872 and before the effective date of the said inheritance tax law, and the court erred in giving the said act a retroactive effect.

II. The court erred in holding that the said act if given a retroactive effect would not violate the provisions of the Constitution of the United States and the provisions of the Constitution of the State of Nevada.

III. The court erred in taxing estates held by the said trustees under the said deed of trust

1873 which were created prior to the effective date of the said act.

IV. The court erred in taxing estates passing by the last will and testament of the said decedent, and in directing the executors of the last will and testament of said decedent to pay said tax, for the reason that the said executors received no property under the last will and testament of said decedent within the jurisdiction of the State of Nevada, and because no estates
1874 passed by the said last will and testament in and to any property within the jurisdiction of the State of Nevada.

V. The court erred in denying defendants' motion for new trial. (Lines 1-6, p. 605 trans.).

VI. The court erred in denying defendants' request for additional findings and in refusing to correct the findings as requested by defendants. (Lines 8-18, p. 605 trans.).

1875 VII. The evidence is insufficient to justify the findings in the following particulars:

1. The evidence is insufficient to justify the finding "That said deed of trust so executed and delivered by Henry Miller on the 17th day of April, 1913, did not completely divest said Henry Miller, nor did he thereby relinquish, control over the interest of the individual beneficiaries named in the instrument, or of the vesting of the property therein described." (Lines 22-28, p. 589 trans.).

1876 2. The evidence is insufficient to justify the finding "That by the terms of said deed of trust said Henry Miller, deceased, retained and possessed the right to effectively destroy or to render practically valueless, the interest of each and every donee as such thereunder, reserving unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament". (Line 28, p. 589-Line 5, p. 590 trans.).

1877 3. The evidence is insufficient to justify the finding "That by said deed of trust the persons named as beneficiaries or as trustees, thereunder, did not come into the possession or enjoyment of any tangible interest or property, but the possession and enjoyment thereof, and of the property designated, named and covered by said deed of trust, was postponed to and depended entirely upon the situation and conditions existing at the time of the death of Henry Miller,
1878 deceased, and not at the time of the execution and delivery of said deed of trust". (Lines 5-16, p. 590 trans.).

4. The evidence is insufficient to justify the finding "That the interest of the trustees and of the beneficiaries in said deed of trust was not vested or fixed or determined until that event occurred". (Lines 16-19, p. 590 trans.).

5. The evidence is insufficient to justify the finding "That said deed of trust was made, ex-

ecuted and delivered with the express purpose and intention, on the part of Henry Miller, deceased, to evade the Inheritance Tax Laws of this state". (Lines 25-29, p. 590, trans.).

6. The evidence is insufficient to justify the finding "That the will contains substantially the same provisions as the deed of trust and expressly directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified, which are the same as specified in the deed." (Lines 10-15, p. 591, trans.).

7. The evidence is insufficient to justify the finding "That said deed of trust is testamentary in character, made in contemplation of death, and as to the donees or beneficiaries, was intended to take effect in possession and enjoyment only upon the death of decedent". (Lines 15-19, p. 591, trans.).

8. The evidence is insufficient to justify the finding "That the total amount of taxes to the State of Nevada is $48,149.78", or any other sum. (Lines 29-31, p. 591, trans.).

9. The evidence is insufficient to justify the finding "That the aforementioned deed of trust made and executed by Henry Miller was made and executed without any valuable or adequate consideration in contemplation of death of the grantor, and intended to take effect in possession or enjoyment at or after the death of said Henry Miller, so far as the beneficiaries other

1882 than said Miller are concerned within the meaning of 'An Act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act and for suits to quiet title against claims of liens arising thereunder', approved March 26, 1913". (Lines
1883 1-18, p. 592, trans.).

10. The evidence is insufficient to justify the finding "That said transfer by said deed of trust, and the several interests and estates passing thereunder and thereby were, and are, subject to the inheritance taxes under the act aforesaid, and said taxes are a lien upon said shares of stock so transferred by said deed of trust." (Lines 23-28, p. 592, trans.).

11. The evidence is insufficient to justify the
1884 finding that the several amounts set forth in said findings, or any thereof, are due as inheritance taxes upon the several rights conferred thereby and set forth in said findings.

12. The evidence is insufficient to justify the finding "That said shares of stock are subject to a lien in favor of the State of Nevada in the aggregate sum of $48,149.78, together with such interest and penalties as may be imposed thereon by the terms and conditions of said act". (Lines 20-25, p. 592, trans.).

1885 VIII. The decision is against law for the following reasons:

1. In this, that the said court held that the estates vesting by the said deed of trust prior to the date upon which the said inheritance tax law became effective were subject to the said law and to the taxes imposed thereby. (Lines 9-18, p. 605, trans.).

2. In this, that the said court held that under the terms of the said deed of trust the said
1886 Henry Miller retained and possessed the right to destroy or to render practically valueless the interest of each and every donee as such thereunder, reserving unto himself the right to determine whether said interests should vest by virtue thereof or under his last will and testament. (Lines 9-18, p. 605, trans.).

3. In this, that the court held that the said beneficiaries and trustees under said deed of
1887 trust did not come into the possession or enjoyment of any tangible interest or property until after the death of Henry Miller. (Lines 9-18, p. 605, trans.).

4. In this, that the court held that the interest of the beneficiaries and trustees under said deed of trust were dependent upon the situations and conditions existing at the time of the death of Henry Miller, deceased, and not at the time of the execution and delivery of said deed of trust. (Lines 9-18, p. 605, trans.).

1888 5. In this, that the court held that the interest of the said trustees and the beneficiaries in said deed of trust was not vested or fixed or determined until after the death of Henry Miller. (Lines 9-18, p. 605, trans.).

6. In this, that the said court held that the said deed of trust with the interests vesting thereby were subject to the inheritance tax act aforesaid. (Lines 9-18, p. 605, trans.).

1889 7. In this, that the said court held that the said deed of trust with the interests vesting thereby were subject to the inheritance tax act aforesaid. (Lines 9-18, p. 605, trans.).

8. In this, that all of the findings above mentioned are inconsistent with the finding that the said Henry Miller made, executed and delivered the said deed of trust. (Lines 9-18, p. 605, trans.).

1890 9. In this, that all of the findings above mentioned are inconsistent with the finding that the said trustees under the said deed of trust are the owners of the said property. (Lines 9-18, p. 605, trans.).

10. In this, that the said court failed to find that on the 17th day of April, 1913, the said Henry Miller was the owner and entitled to the possession, and in the possession of said 119,871.75 shares of the capital stock of Miller & Lux Incorporated. (Lines 9-18, p. 605, trans.).

1891 11. In this, that the said court failed to find that upon the 17th day of April, 1913, the respondents became and ever since have been and now are the owners of said shares of stock and entitled to the possession thereof, and in the actual possession of the same. (Lines 9-18, p. 605, trans.).

12. In this, that the court failed to find that all of said shares of stock vested in said trustees and the interests of said several beneficiaries
1892 under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective, and that the same were not subject to the inheritance tax or transfer tax under the provisions of the said act, and that said act was not retroactive, and did not intend to tax the transfer which took place before the effective date of the said act, and that to give the same a retroactive effect
1893 and to make the same applicable to such a transfer would take the property of the respondents and of the beneficiaries under said deed of trust without due process of law, in violation of the 14th amendment to the Constitution of the United States, and would take the property of the respondents and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the 14th amendment to the Constitution of the United States; that the same would deny to the respondents and to the

1894 beneficiaries under said deed of trust the equal protection of the law, in violation of the 14th amendment of the Constitution of the United States, and impair the obligation of contracts, in violation of Section 10 of Article I of the Constitution of the United States, and deprive the respondents and the beneficiaries under said deed of trust of their property without due process of law, in violation of section 8, Article I of the Constitution of the State of Nevada, and
1895 would take private property, to wit: the property and rights transferred to respondents and to the beneficiaries under said deed of trust for a public use without just compensation having been first made or secured, in violation of section 8, of Article I of the Constitution of the State of Nevada, and would impair the obligation of contracts in violation of section 15 of Article V of the Constitution of the State of Nevada, and would constitute a property tax as distinguished
1896 from a transfer tax, and not levied uniformly and equally upon all the property of the said State of Nevada, in violation of section 1 of Article X of the Constitution of the State of Nevada. (Lines 9-18, p. 605, trans.).

13. In that the said court failed to find that the claim of the petitioner to a lien upon the said property is without right and that the petitioner has no right, title, interest or estate in or lien upon the said property, or any part thereof. (Lines 9-18, p. 605, trans.).

14. In that the said court failed to find that at the time of the death of the said Henry Miller the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in the complaint herein, but the said Henry Miller transferred and conveyed all of the said property to the said trustees by the said deed of trust on the 17th day of April, 1913, and at the time of his death he left no property within the jurisdiction of the State of Nevada, subject to said inheritance tax over and above exemptions allowed by law, or otherwise. (Lines 9-18, p. 605, trans.).

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

1900 STIPULATION TO TRANSCRIPT.

It is hereby stipulated that the foregoing printed transcript containing 634 printed pages including this page, contains a full, true and correct copy of the bill of exceptions and statement on appeal, and also the judgment roll, judgment and order appealed from, notice of appeal, opinion of district court, and assignment of errors in the above entitled proceeding that the judgment roll being incorporated in the bill
1901 of exceptions and statement on appeal, need not be repeated in said transcript; that the same shall constitute the record on appeal herein from the judgment and order denying motion for new trial, and said appeals may be heard and determined thereon.

Dated, Sept 27th, 1917.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

1902

EDWARD F. LUNSFORD,
GEO. B. THATCHER,
Attorneys for Respondent.

No. 2310

In the Supreme Court

OF THE

State of Nevada

GEORGE A. COLE, as State Controller of the State of Nevada,

Respondent,

vs.

J. LEROY NICKEL and NELLIE MILLER NICKEL, trustees, etc., et al.,

Appellants.

TRANSCRIPT OF PROCEEDINGS IN THE SUPREME COURT.

In the Supreme Court of the State of Nevada.

No. 2310

GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent,

vs.

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees, etc., et al.,
Appellants.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

GEORGE B. THATCHER,
Attorney General, and

E. F. LUNSFORD,
District Attorney for Washoe County,
Attorneys for Respondent.

OPINION.

By the Court, SANDERS, J.

This was a statutory proceeding brought by Cole as Controller of the State of Nevada against the appellants under our so-called Inheritance Tax Law. (Stats. of 1913, p. 411.) The appeal is prosecuted to review an order and judgment assessing and adjudging a transfer tax against the property involved for the sum of $48,149.78, and from an order denying and overruling the appellants' motion for a new trial.

The facts of the case are as follows: On March 26th, 1913, the Inheritance Tax Law was approved, but by the terms of Section 31 of the Act it did not take effect until thirty days thereafter, or April 25th, 1913. (Stats. of 1913, pp. 411-422.) Prior to April 17th, 1913, Henry Miller, deceased, a resident of San Francisco, California, was the owner of 119,875.75 shares of stock in Miller & Lux, Incorporated, a Nevada corporation. This corporation owned all of the capital stock of the Pacific Livestock Company, a California corporation. The latter corporation owned a large amount of real estate and personal property in Nevada, appraised at $1,431,326.86. To the extent that this stock represented the property situated in Nevada, it is taxable under Section 1 of the Act, which provides:

"For the purposes of this Act, the ownership of shares of stock in a corporation owning property in this state shall be considered as the ownership of such interest in the property so owned by such corporation, as the number of shares so owned shall bear to the entire issued and outstanding capital stock of such corporation."

This proposition is not disputed by appellants if the property is otherwise subject to the Act.

An April 17th, 1913, after the enactment and adoption of the Act in question, and eight days before it became effective, Henry Miller, having prior thereto made other wills, published and declared his last will and testament, nominating therein Nellie Miller Nickel, J. Leroy Nickel and F. B. Anderson as executors thereof without bonds. Immediately after the publication and

declaration of his will, Henry Miller executed and delivered to Nellie Miller Nickel and J. Leroy Nickel a deed of trust, by which all of the said stock was transferred to said trustees upon certain trusts. On the same date the trustees accepted the trust in writing. On the same date the stock was transferred on the books of the corporation to the trustees. The deed of trust and stock were thereafter kept in the exclusive custody of the trustees. At the time of the execution of the will and deed Henry Miller was eighty-six years of age; was an invalid under medical care and treatment, and afflicted with physical ailments from which he never recovered, and on October 14th, 1916, he died. On June 4th, 1913, Henry Miller published and declared a codicil to his last will and testament, whereby the said Anderson was relieved of his trust as executor, he having theretofore expressed his desire to decline the trust. The deed contains substantially the same trusts as the will, and directs the trustees to pay the beneficiaries the amounts therein specified, which are the same as named in the will, and on the same conditions and limitations. The stock was, by the deed of trust, transferred to the trustees:

"To have and to hold the same as such trustees upon the following uses and trusts and for the following uses and purposes, that is to say:"

I.

"During the lifetime of the said party of the first part the said trustees shall receive the rents, issues and profits of said property and pay the same to the party of the first part, during the term of his natural life."

II.

"1. Upon and after the death of the said party of the first part the said trustees shall take and hold all of said property, and shall convert sufficient thereof into cash to pay the several amounts hereby directed to be paid, and shall collect the rents, issues and profits thereof, and therefrom shall be by them applied in the manner hereinafter set forth:"

"2. From the proceeds of the sale of said property said trustees shall pay the following sums:"

(Then follows list of persons and amounts to be paid to them. Some of these payments are to be made monthly and shall not extend beyond the lives of designated parties and "their children living at the time of the death of the party of the first part". It also provides that upon the death of certain of said parties before receiving said sums, the share of such deceased persons shall go to others.)

"(o) They shall pay to the following named employees of said party of the first part and Miller & Lux, Incorporated, the following sums as soon after the death of said party of the first part as possible:"

(Then follows list of such employees with the amounts to be paid to each.)

"If any of the above named persons be not employed by said party of the first part or Miller & Lux, Incorporated, at the time of the death of said party of the first part, the provisions by this subdivision made for him shall lapse."

(Then follows list of other beneficiaries, with the amounts to be paid to each, followed by the provisions that all of the income from the said property, except the income from certain specified bequests, "from the time of the death of said party of the first part shall be paid to the daughter of said party of the first part, etc.")

III.

"Nothing herein shall be construed to restrain the free alienation of any of said property and said trustees may sell any of said property at public or private sale, with or without notice, and on such terms as they may see fit. Whenever said trustees are authorized to invest any of said property, they shall invest the same only in real estate, mortgages on real estate, bonds of the United States, or of some county or municipal corporation within the United States, or stock or bonds of the corporations Miller & Lux, Incorporated, Pacific Live Stock Company, or the San Joaquin & Kings River Canal & Irrigation Company, Incorporated. All of the sums directed to be paid by the second (II) paragraph of this deed shall be paid as soon as sufficient money may be realized from the sale of the said property without injury thereto, and the same shall be paid as soon as in the judgment of said trustees it can be done without loss, but not later than ten (10) years after the death of said party of the first part and during the lives of the descendants of said party of the first part living at the time of his death, and said trustees may pay the same in such amounts and at such times as may be most beneficial, and none of said

amounts shall bear interest; provided, that at least one hundred and fifty (150) dollars a month shall be paid on account of the provision for the daughter-in-law of said party of the first part, Sarah E. Miller, from the time of the death of said party of the first part. Nothing herein shall be construed to require or permit the accumulation of the income of said property, but the entire income of said property shall at all times be applied to the purposes herein set forth. If any person to whom any sum of money is directed to be paid dies before the death of said party of the first part, such provision shall lapse except as otherwise provided herein. If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provision herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein."

It appears that Henry Miller once expressed a desire to change one of the legacies specified in the trust deed, but he was advised by his counsel that it was not possible for him to do so *as no power of revocation had been reserved in the deed.*

It is the contention of the State of Nevada that the deed of trust was either made in contemplation of death,

or was intended to take effect in possession or enjoyment at or after death within the meaning of the term "contemplation of death" as used in the Act, which is defined by the Act as follows:

"The words 'contemplation of death' as used in this act shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift causa mortis * * * ." (Sec. 30.)

Counsel for appellants in reply to this position state in their brief:

"It is not necessary for us to discuss these questions, because *for the purpose of this appeal only* we are willing to concede that if this act had been in force at the time of this transfer, the same might be held to be made in contemplation of death, or not intended to take effect in possession or enjoyment at or after death within the meaning of the statute. (Sec. 1.) We do this because we have entire confidence in the position which we take in the case, viz: that whether in fact made in contemplation of death, or in law or in fact intended to take effect *in possession or enjoyment* after death so far as the beneficiaries other than Henry Miller are concerned, the transfer at its date created vested interests to which the act was not intended to apply, and to which it could not constitutionally apply."

If we clearly interpret counsel's admission, the questions to be determined are narrowed down to three

propositions: Did the deed of trust create a vested estate? Does the act apply to transfers made before it became effective? Can the act constitutionally be made to apply to such a transfer? Reading the opinion of the trial court in connection with its findings and conclusions, we take it that the last question is eliminated from the case. The district court in its opinion states:

"It will be noted that the statute went into effect April 25, 1913, and is not by its express terms made retroactive. Hence, it must be construed as having only a prospective operation, as no intent to make the same operate retrospectively may be inferred from the words therein employed; therefore, if the interests in the property mentioned in the deed passed to and vested absolutely in the beneficiaries therein named upon the date of the execution and delivery of the deed and independently of the death of Henry Miller, no tax may lawfully be imposed thereon."

In this situation the vital point raised is, did the deed of trust as of its date create a vested estate so as to exempt the transfer from the operation of the statute? The execution of the will, the deed and the transfer of the stock was one transaction. To determine whether the indenture immediately vested the legal title to the stock so as to exempt the transfer from a transfer tax under the statute the instruments must be construed together as a single instrument. (In re. Brandeth, 169 N. Y. Supp. 142; State v. Pabst, 121 N. W. 360.) While it is true that the nominal sum of $10.00 is named as the consideration of the deed, we do not apprehend that it would be contended that the deed was intended to be

anything more than a voluntary deed of gift to those whom the deceased regarded as the natural and worthy objects of his bounty. Considering the deed and will, simultaneously executed, the physical condition of the deceased at the time, and the facts and circumstances attending and leading up to the execution of the indenture and transfer of the stock, as well as the language employed in the deed, construed in connection with that employed in the will, indicates that the deceased disposed of his property to take effect in possession or enjoyment at or after his death. From the evidence, the impression is irresistible that the deed of trust was an afterthought to avoid if possible an expected increase in the inheritance tax rate in California, and a probable inheritance tax of the Federal Government. Clearly the deceased was advised of these possibilities prior to the execution of the deed. This materially affects the weight of the deed as evidence in a case seeking to impose upon the transfer a transfer tax in this or any other court. The deceased, after the execution of the instruments and delivery of the deed, was advised that however much he desired to change any legacy provided for therein he could not do so, because no power of revocation had been reserved in the deed. This tends to indicate that the deceased in the first instance did not regard the indenture as irrevocable. We do not doubt the sincerity of the advice, but we are unable to perceive why the principle of law involved should be arbitrarily applied to the facts of this case, particularly in view of the expressed limitation in the deed that, upon and after the death of the grantor the trustees

shall take and hold all of said property. The paper clearly contemplates posthumous operation. It is only in cases where other parties besides the person creating the trust have an interest therein that the trust becomes irrevocable. We see nothing in the deed that could have prevented the deceased from revoking the trust had he desired so to do. No beneficiaries or third party, as far as the record shows, had any present interest in the property to prevent the deceased, if necessary to do so, from invoking a court of equity to revoke the trust. The appellants and other appointees under the will had no such interest because the deceased could have revoked his will, and made another in favor of other parties. His beneficiaries in the indenture had no such interest, because the deceased had power by will to secure the property to others, and entirely exclude them from all interest therein. (In re. Ogsbury's Est., 39 N. Y. Supp. 981.) It is clear from both instruments that the trustees were not empowered to transfer any interest or pay any legacy created by either instrument until the death of the grantor. The property was to all intents and purposes that of Henry Miller, subject to the disposition made of it by his will published and declare simultaneously with the deed. No reason is suggested why Miller should conclude himself from the right of disposing of his property by will, or that the deed should be construed as nullifying his will. We do not say that it is necessary to the validity of a deed that it should convey an estate in immediate possession, but it is necessary that it should take effect in interest upon its execution, though the right of possession or enjoyment may

not take place until the happening of a certain event. (Wall v. Wall, 64 Am. Decs. 152.) If, however, the interests created do not arise until the death of the donor, or some other future time, the instrument cannot be a deed, although it may be so denominated by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered. (Babb v. Harrison, 70 Am. Decs. 204.) We do not deny that the donor may convey an interest, reserving a lifetime estate to himself, but a deed, if made with a view of the disposition of a man's estate after his death, inures in law as a devise or will. (Wellborn v. Weaver, 63 Am. Decs. 242.)

We are clearly of the opinion, construing the instruments together and in connection with other evidence, that the district court correctly found that Henry Miller did not divest himself of, or relinquish control over, the interests of the beneficiaries named in the instruments, and it was not until the death of Miller that the transfer in any respect became absolute, and that the beneficiaries became irrevocably entitled to the various sums mentioned in the deed after the death of Miller.

There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees or devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance. (Keeney v. N. Y., 221 U. S. 534, 56 L. Ed. 304.)

The statute in question taxes the passing of property, or any interest therein, in the possession, enjoyment present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment. (Sec. 31, Stats. of 1913, p. 422.) This statute taken as a whole goes further than that of New York, and the fine distinctions made in the briefs of cases in that and other jurisdictions tend rather to confuse than aid the court in construing a local statute. The statute in terms taxes gratuitous acquisitions of property under trust conveyances intended to take effect in possession or enjoyment at or after death. But, however broad and comprehensive its terms, the statute was not intended to restrain persons in their right to transfer property in all legitimate ways. It is the policy of the law to encourage making conveyances in fee, and it is as lawful to create an estate for life with remainder after death of the grantor as it is to convey in fee, but there is a marked difference in "taxing a right and taxing a privilege". By the statute the favorite transfer in fee is not taxed with the privilege. The tax is not a property tax, but is in the nature of an excise tax, to wit, on the transfer of property. (In re. Williams, 40 Nev. 239.) The language of the statute manifests its purpose to tax all transfers which are accomplished by will, the intestate laws, and those made prior to death which can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it the characteristics of a devolution made at the time of the donor's death. (State v. Pabst, *supra.*)

But it is earnestly insisted that as the transfer of the property was made before the Act became effective no tax accrued. This leads to the discussion of the question: When does a transfer tax as imposed by the statute accrue? To this there can be but one answer,—at the death.

Says Chief Justice White, in Knowlton v. Moore, 178 U. S. 56, 44 L. Ed. 976:

"* * * Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

From this we conclude that the statute taxes not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death. (Knowlton v. Moore, *supra;* Hansen's Death Duties, p 63.) Had Henry Miller died testate or intestate between the enactment and taking effect of the act no tax would accrue, but the weakness of the appellants' position in this connection is that the property did not vest until after the statute became effective. The actual possession or enjoyment by those entitled to Miller's bounty under the will and deed was postponed to take effect at or after his death. Conceding that the law did not become effective until thirty days after its enactment, we are of the opinion that in this as in other cases the legislature deemed it best to give notice to the public of its provisions for this period of time before it became effective, and the interval of time was not intended to

afford ingenious minds an opportunity to devise schemes to defeat the purpose of the act. The rights and obligations of all parties in regard to the payment of an inheritance tax are determinable as of the time of the death of the decedent (English v. Crenshaw, 127 Am. St. Reps. 1053) and as we conclude that the property in question did not vest at the date of the transfer, it follows that the transfer is subject to the tax under the statute in question.

The judgment is affirmed.

SANDERS, J.

I concur:

McCARRAN, C. J.

COLEMAN, J. (Dissenting).

I dissent from the opinion filed in this case by my learned associates. That opinion is made to turn upon the conclusion that the title to the property in question did not vest in the trustees at the time of the execution and delivery of the trust agreement, but that it vested upon the death of the settlor. That was the very theory upon which the trial court rendered its judgment. If that conclusion is sound, it must necessarily follow that the tax is due and collectable.

Whatever might be my view as to a transaction, such as appears from the record in this case, had it taken place in this State, I think that, in view of the fact that it took place in California, where all of the parties reside, where the property was situated, and where the declaration of trust was executed and delivered, the

question as to whether or not the title to the property vested at the time of the execution and delivery of the trust agreement is controlled by the law of California. The Supreme Court of that State, in Nichols v. Emery, et al., 109 Cal. 323, 41 Pac. 1089, laid down the rule which I think is binding upon the court in the case at bar upon the point in question. In that case the settlor reserved the right to revoke the trust, but died without exercising the right. The court said:

"It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death and passing no present interest. The essential characteristic of an instrument testamentary in its nature is that it operates only upon, and by reason of, the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights, and divested himself of no modicum of his estate; and, per contra, no rights have accrued to, and no estate has vested in, any other person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory. It acquires a fixed status, and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. Upon the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee; and, when the instrument creating the trust is other

than a will, that estate or interest must pass immediately. Perry, Trusts, sec. 92. By such a trust, therefore, something of the settlor's estate has passed from him, and into the trustee, for the benefit of the cestui; and this transfer of interest is a present one, and in no wise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or an intermediate estate. Civ. Code, sec. 707. Did the grantor in the present case divest himself, by the instrument, of any part of the estate in the land which he had formerly owned and enjoyed? By the terms of the instrument, an estate was assuredly conveyed to the trustee. The language is appropriate to a conveyance, and the grantor's execution and delivery of the deed (both found), he being under no difficulty, and impelled by no fraud, operated to divest so much of his estate in the trustee as was necessary to carry out the purpose of the trust. The especial purpose was to sell and distribute the proceeds upon his death,—a legal purpose, authorized by section 857 of the Civil Code. The term of the duration of the trust,—the life of the settlor,—did not violate the provisions of section 715 of the same code. We have, therefore, an estate conveyed to a named trustee, for named beneficiaries, for a legal purpose and a legal term,—such a trust as conforms, in all its essentials, to the statutory requirements. That no disposition is made by the trust of the interest and estate intervening

in time and enjoyment between the dates of the deed and the death of the settlor, cannot affect the trust. The trustee takes the whole estate necessary for the purposes of the trust. All else remains in the grantor. Civ. Code, sec. 866. In this case there remained in the grantor the equivalent of a life estate during his own life, and he was thus entitled to remain in possession of the land, or lease it and retain the profits. Nor did the fact that the settlor reserved the power to revoke the trust operate to destroy it, or change its character. He had the right to make the reservation. Civ. Code, sec. 2280. But the trust remained operative and absolute until the right was exercised in proper mode. Stone v. Hackett, 12 Gray 232; Van Cott v. Prentice, 104 N. Y. 45; 10 N. E. 257. Indeed, this power of reservation was strongly favored in the case of voluntary settlements at common law, and such a trust, without such a reservation, was open to suspicion of undue advantage taken of the settlor. Lewin, Trusts, pp. 75, 76; Perry, Trusts, sec. 104. We think, however, that the circumstances of the reservation of power to revoke, and the limitation of the trust upon the life of the settlor, have operated to mislead the learned judge of the trial court. If the life selected had been that of a third person, and if no revocatory power had been reserved, no one would question but that a valid express trust had been created. But the fact that the designated life in being as the settlor's could not operate to destroy its validity, for he had the right to select the life of any person as the measure of duration. And the fact that he reserved the right to revoke did not impair the trust, nor affect

its character, since title and interest vested subject to divestiture only by revocation, and, if no revocation was made, they became absolute. A man may desire to make disposition of his property in his lifetime, to avoid administration of his estate after death. Indeed, in view of the fact, both patent and painful, that the fiercest and most expensive litigation, engendering the bitterest feelings, springs up over wills, such a desire is not unnatural. And when it is given legal expression, as by the gifts absolute during life, or voluntary settlements, there is manifest, not only an absence of testamentary intent, but an absolute hostility to such an intent."

Other California cases sustaining the decision quoted are: Tennant v. Tennant Memorial Home, 167 Cal. 570, and Gray v. Union Trust Co., 171 Cal. 637.

Do the circumstances of the case, particularly the making of the will by Miller, show that it was not the intention that the trust agreement should operate to vest title to the stock except upon the death of Miller? In considering this question, it becomes necessary to call attention to the matter of the Estate of Stanford, 126 Cal. 122, another California case, in which it is said:

"An estate is vested when there is an immediate right of present enjoyment or a fixed right of future enjoyment."

With the rule laid down in the language just quoted, and that declared in Nichols v. Emery, *supra*, in mind, it is necessary to inquire if, at the time of the execution and delivery of the declaration of trust and the trans-

fer of the stock certificates, an estate so vested that the beneficiaries acquired a *fixed right of future enjoyment*. If they did acquire such a fixed right of future enjoyment, then the contention of the State cannot be sustained. If the theory of the State is sound, Miller could, by a will executed subsequent to the trust agreement, have revoked the declaration of trust. Suppose he had tried to do that very thing, and pursuant to such will the trustees had repudiated the trust agreement, in what court would the beneficiaries have brought suit to compel the performance of the trust? Certainly no other courts would have had jurisdiction than the courts of California, and they would be bound by the decisions from that State, to which I have alluded. Would the court of that State say that under the circumstances leading up to the execution of the trust, and contemporaneous with it, no estate was so vested under the trust as to establish a fixed right of future enjoyment in the beneficiaries named? The only circumstances connected with the entire transaction which throw any light upon it are the physical condition of Miller at and shortly prior to the time of executing the trust and the execution of the will simultaneously with the execution of the trust. Just how the fact that Miller was in poor health can aid the court in determining whether or not he intended that a fixed right of future enjoyment should vest under the trust, is more than I am able to see; but, if it can, there is nothing in it which justifies the conclusion that he did not so intend. If a fixed right of future enjoyment vested under the terms of the declaration of trust, such right was not, and could not have been, divested by the will.

It seems to me that the strongest circumstance surrounding the entire transaction, throwing light upon the character of the declaration of trust, is the indorsing and delivering of the stock certificates by Miller at the time of executing and delivering the declaration of trust. By that act he completely surrendered control, for all time, of the property in question; for not having reserved the right to revoke the trust, such revocation was impossible, as shown in the case of Nichols v. Emery, *supra*, which rule is sustained by the overwhelming weight of authority. (See 1 Perry on Trusts, 6th ed., sec. 104; 39 Cyc. 92.) But the majority opinion states that the deceased (Miller) "disposed of his property to take effect in possession or enjoyment at or after his death". From this statement it seems that the court concluded that Miller did that which was held In re Stanford's Estate, *supra*, to be sufficient to create a fixed right of future enjoyment.

If Miller "disposed" of the property, the title must have vested, in which case there was a fixed right of future enjoyment at the time of the execution of the trust agreement, which was prior to the time the inheritance tax law of Nevada went into effect, and hence no inheritance tax is collectable unless the act operates retrospectively. The learned trial judge held that the act does not operate retrospectively, in which, I think, he was clearly right; for it would seem absurd to say that such could have been the intention, when in express terms the act was made to go into effect thirty days after approval; besides, there is absolutely nothing to indicate that it was the intention that the act

should so operate, and it is a well-known rule of law that:

"All statutes are to be construed as having only a prospective operation, unless the purpose and intention of the legislature to give them a retrospective effect is expressly declared, or is necessarily implied from the language used. In every case of doubt, the doubt must be solved against the retrospective effect." (36 Cyc. pp. 1205-1208. See, also, Milliken v. Sloat, 1 Nev. 577; Hunter v. Savage, etc., 4 Nev. 154; State v. Manhattan S. M. Co., 4 Nev. 333; State v. Manhattan V. Co., 32 Nev. 474; State v. Eggers, 33 Nev. 535; Chew Heong v. U. S., 112 U. S. 536; Winfree v. N. P. R. Co., 227 U. S. 301, 57 L. ed. 518.)

However, I do not understand that the learned Attorney-General questions the correctness of the rule invoked, but he insists that the provision in the inheritance tax law which provides that when property shall pass without valuable consideration, and "in contemplation of the death of the grantor * * * or intended to take effect in possession or enjoyment at or after such death," it shall be liable to the tax, subjects the property rights in question to the terms of the inheritance tax law. To sustain this view, reliance is had upon the following authorities:

In re Masury's Estate, 28 App. Div. 380, 51 N. Y. Supp. 331; In re Ogsbury's Estate, 39 N. Y. Supp. 978; In re Barbey's Estate, 114 N. Y. Supp. 725; In re Patterson's Estate, 127 N. Y. Supp. 284; In re Seaman's Estate, 147 N. Y. 68, 41 N. E. 401; In re Green's Estate, 153 N. Y. 223, 47 N. E. 292; In re Bostwick's Estate, 160

N. Y. 489, 55 N. E. 208; In re Brandreth's Estate, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148; In re Douglas County, 84 Neb. 506, 121 N. W. 593; Appeal of Siebert, 110 Pa. S. 329, 1 A. 346; In re Maris Estate, 14 Pa. Co. Ct. R. 171, 3 Pa. Dist. R. 38; Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549; New England Trust Co. v. Abbott, (Mass.), 91 N. E. 379; State v. Bullen, 143 Wis. 512.

In the first case mentioned (In re Masury's Estate, 28 App. Div. 380, 51 N. Y. Supp. 331), the deed was executed in 1890, but the inheritance tax law had been in effect since 1885. The question involved in this case was not presented to the court in that case.

In the matter of Ogsbury's Estate, 39 N. Y. Supp. 978, it appears that the transfer was made to the trustees upon the condition that they should, upon the death of the grantor, transfer and convey the property to such person or persons as the grantor should direct in his will. There is no similarity between that case and the one at bar.

The matter of Barbey's Estate, 114 N. Y. Supp. 725, was decided in 1908, twenty-three years after an inheritance tax law had been enacted, and it does not appear that the transfer was made before the act became operative, but it does appear that the sole ground upon which the opinion was based was the fact that the grantor reserved to himself the right of ownership in the trust property until his death. The case is not in point.

In re Patterson's Estate, 127 N. Y. Supp. 284, is one in which the trust law was enacted after the inheritance act had gone into effect. It is not an authority on the point in question.

In the matter of Douglas County, 84 Neb. 506, 121 N. W. 593, the inheritance law took effect July 1, 1901, and the trust was created in 1904. Hence the question here involved was not presented.

It appears In re Maris Estate, 14 Pa. C. Ct. 171, 3 Pa. Dist. R. 38, that the inheritance law was passed in 1887, and that the deed was made in 1891. The question here presented was not involved.

In the matter of Green's Estate, 153 N. Y. 223, 47 N. E. 292, the trust was created in 1889, four years after the inheritance tax law had taken effect. It is no authority upon the point involved.

In the matter of Bostwick's Estate, 160 N. Y. 489, 55 N. E. 208; in the matter of Brandreth; in the matter of the Appeal of Siebert, and in Crocker v. Shaw, the trusts were created after the inheritance tax act had taken effect.

In the case of State v. Bullen, 143 Wis. 512, the point insisted on in this case was not considered. Furthermore, the court says in its opinion:

"As we have seen, Mr. Bullen reserved the right to direct and control the distribution of the trust property and to revoke the trust at any time during his life."

The opinion in that case is not authority upon the point in question.

The case of New England Trust Co. v. Abbott is not in point. The court says:

"The only part of the property which was finally disposed of in a known and definitely stated way was the income for the period of five years. The disposi-

tion of the principal was left subject to contingencies, any one of three of which might terminate the trust and give direction to the payment of the principal."

Nothing became vested until the death of the creator of the trust, which was after the inheritance tax law had gone into effect. I am unable to see in what way this case sustains the contention of counsel.

As to the case in In re Seaman's Estate, which it is contended sustains the contention of the State, it may be said that while it is possible that different deductions may be drawn as to what was really decided, nevertheless the opinion in that case has been interpreted by the New York courts, where a different view from that contended for by the Attorney-General is maintained.

In the matter of Craig's Estate, 89 N. Y. Supp. 971, it was held that an act imposing an inheritance tax would not affect an estate which had vested before the act went into effect. In that case the Seaman case was interpreted, and the court said:

"It is true that something is said (in the Seaman case) which may seem to be in conflict with the view I am taking, but I am sure there is nothing in the actual decision to that effect."

This opinion was affirmed by the Court of Appeals of New York in 181 N. Y. 551, 74 N. E. 1116, without comment, thereby approving all that had been said by the lower court. But whatever may be said of the Seaman Case, or of the Craig Case, the Court of Appeals In re Pell, 171 N. Y. 48, 63 N. E. 789, held that when an estate accrued before the passage of an amendment

providing for a tax, but coming into actual possession after the amendment, the amendment was void. So far as I have been able to learn, there has been no decision holding squarely to the contrary, unless it be the case of people v. Carpenter (Ill.), 106 N. E. 302. But the force of the Carpenter Case is entirely lost, in view of the fact that the conclusion therein reached is based upon the court's interpretation of In re Seaman, *supra*, since the New York court from which the Seaman Case emanated has put the interpretation upon the case which we contend for.

But counsel for respondent seek to distinguish the Craig Case, *supra*, from the case at bar. They say the deed in that case was made in contemplation of marriage and not of death, and was designed to make an effective provision *in praesenti* for the prospective wife and the possible offspring. It is true, as claimed by counsel, that the trust in that case was created in contemplation of marriage, but that was not made the turning point in the decision. The court in that case says:

"The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer either made or contemplated, and that subsequent legislation imposing such a tax must be deemed unconstitutional, as, in effect, the taking of private property for public use without compensation, or as impairing the obligation of a contract.

In other words, the appellants contend that at least as early as May, 1885, they had acquired their rights by irrevocable deed; that such rights, whether vested or contingent, then constituted present property interests in future estates, which were vested in the sense that they were secured to them by deed, subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute, and not merely privileged, could not afterwards be taxed by the state, because of the well-settled principles of constitutional law."

The point involved in that case is the identical point in question here, namely, whether the accrual of the "right as a property right to take the gifts when the time for the possession and beneficial enjoyment should ultimately arrive had fully accrued at the date" of the creation of the trust, or whether it accrued upon the death of the donor. The court held that the right fully accrued under the trust at the time of the consummation of the marriage. In the case at bar the rights of the beneficiaries under the trust, as prospective rights to take the gifts when the time for the possession and beneficial enjoyment should ultimately arrive, accrued at the date of the creation of the trust. They were rights which the settlor could not revoke or defeat, and hence the law which thereafter went into effect providing for an inheritance tax did not apply.

In the case of Hunt v. Wicht, 162 Pac. 639 (Cal.), wherein it appears that William Garms executed a deed

of conveyance to Ulrice Garms, conveying certain property, and deposited it in escrow, to be delivered upon his death. The deed was placed in escrow before his death and before the inheritance tax act was passed. But William Garms died after the act had become a law, whereupon the deed was delivered to the grantee. It was sought to recover an inheritance tax, upon the theory that the conveyance was a transfer by deed "made without valuable and adequate consideration, in contemplation of death * * * or intended to take effect in possession or enjoyment at or after such death," it being contended that the grantee in the deed took pursuant to the terms of the inheritance tax law, which provided for the levying of a tax where the party taking "becomes beneficially entitled in possession or expectancy to any property or the income thereof, by any such transfer, *whether made before or after the passage of the act.*"

The court held that the tax could not be collected, and said:

"We have then the case of a grant of land so executed and delivered on April 12, 1905, as to be fully operative and effective on that date to vest a *present title* in the grantee, subject only to a life interest in the grantor; 'an executed conveyance' (Estate of Cornelius, supra) of this property in fee-simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed *transfer of title*, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by

the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any times subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself, and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and nondefeasible, and the Legislature could not thereafter lawfully destroy, impair, or burden this property right under the guise of a succession tax on account of the transfer. As said in Matter of Craig, 97 App. Div. 289, 89 N. Y. Supp. 971 (affirmed 181 N. Y. 551, 74 N. E. 1116):

'The underlying principle which supports the tax is that such right (the right of succession) is not a natural one, but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the

character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guarantees.'

It is the vesting in interest that constitutes the succession, and the question of liability to such a tax must be determined by the law in force at that time. This view is not opposed to Estate of Woodard, 153 Cal. 39, 94 Pac. 242, cited by appellant, where the statute in force at the time of death of a testator was held applicable, rather than a later act, simply because it was at the time of such death that the estate vested in the devisee and legatee. What we have said appears perfectly clear on principle, and is sustained by practically all of the authorities in other states where the question has arisen. In New York the matter is settled by several decisions. In the Matter of Pell, 171 N. Y. 48, 55, 63 N. E. 789, 791 (57 L. R. A. 540, 80 Am. St. Rep. 791), it is said that such a transfer tax being one not imposed on property, but upon the right to succession, it 'follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation,' and also, 'if these estates in remainder were vested prior to the enactment of the Transfer Tax Act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.' "

It is my opinion that it was not the intention of the legislature that the inheritance tax act should apply to such a case as the one at bar; and, furthermore, that if such was the intention, so much of the act as so provides is unconstitutional, null and void.

COLEMAN, J.

(Endorsed): Filed January 6th, 1919.

Wm. Kennett, Clerk.

JUDGMENTS OF THE SUPREME COURT.

No. 2310

George A. Cole, as State Controller of the State of Nevada,

Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, Trustees, etc., et al.,

Appellants.

Appeal from the Second Judicial District Court, Washoe County, Nevada.

HON. R. C. STODDARD, Judge.

Attorneys:

Cheney, Downer, Price & Hawkins, and Edward F. Treadwell for Appellants;

George B. Thatcher, Attorney General, and E. F. Lunsford, District Attorney of Washoe County for Respondents.

This case came on regularly to be heard on the 9th day of September, A. D. 1918, it being a regular day of

the July, A. D. 1918, term of this court, when Edward F. Treadwell, Esq., and Judge S. S. Downer, of counsel for appellants, and George B. Thatcher, Esq., of counsel for respondent, all being in court, were each duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day all and singular, the law and the premises having been seen, heard and duly considered, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by Sanders, J., concurred in by McCarran, C. J. (Coleman, J., writing a dissenting opinion), to the effect:

"The judgment is affirmed."

Whereupon, it is now ordered, adjudged and decreed that the judgment of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the above entitled case be, and the same is hereby affirmed.

Judgment entered this 6th day of January, A. D. 1919.

Attest: Wm. Kennett, Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent.

vs.

J. Leroy Nickel and Nellie Miller Nickel, Trustees, etc., et al.,
Appellants.

ORDER OF COURT.

In Chambers:

Present: Hon. B. W. Coleman, C. J.

It appearing that one member of the court did not participate in the consideration of this case when it was originally before this tribunal, and is unwilling to take final action herein until after oral argument, and of the further fact that no opinion has been filed in a companion case in which the same questions of law are involved, the court, of its own motion, hereby grants the petition for a rehearing herein, notwithstanding the fact that the time has not expired in which the Attorney-General may file a reply to appellants' petition for a rehearing.

Done at Carson City, Nevada, this 25th day of March, A. D. 1919.

Attest: Wm. Kennett, Clerk.

(Endorsed): Filed March 25, 1919.

Wm. Kennett,
Clerk.

In the Supreme Court of the State of Nevada.

Nellie Miller Nickel et al., Appellants, vs. The State of Nevada, Respondent.	No. 2309
George A. Cole, as State Controller of the State of Nevada, Respondent, vs. J. Leroy Nickel and Nellie Miller Nickel, Trustees, etc., et. al., Appellants.	No. 2310

CHENEY, DOWNER, PRICE & HAWKINS, and
EDWARD F. TREADWELL,
Attorneys for Appellants.

LEONARD B. FOWLER,
Attorney General, and
ROBERT RICHARDS,
Deputy Attorney General,
Attorneys for Respondents.

OPINION ON REHEARING.

By the Court, SANDERS, J.

The above entitled causes were briefed, argued, submitted and considered as one case. Because of a change in the personnel of the court it became necessary to resubmit the causes in order to dispose of the position

for rehearing and to finally determine the case of Nickel, et al., v. The State of Nevada, it appearing that the latter case remains undetermined.

No better way is suggested for assisting the court in searching for error where a rehearing is granted than to carefully consider a well directed criticism of the opinion upon which its conclusion is based. In this instance counsel for the losing parties in polite terms insist that the opinion of the majority is in conflict with the well established principles of comity of decisions between states, and that the opinion is contrary to private international law. The argument, coming as it does from such an eminent source, is worthy of some further consideration.

Every owner of property has the inherent right to dispose of his property in such form, such manner and for such purposes as he may see fit, but where the devolution of title involves a succession or an inheritance tax it is governed and controlled by the law of the forum imposing the tax if the transfer sought to be taxed is within the jurisdiction of its tax authorities. The difficulty with the application of counsel's rule of comity is that there is no foreign element in this litigation, other than it happens that the transfer in question was made, the parties thereto and the property affected thereby were located in our sister State of California. The property affected by the alleged transfer consists of 119,871.75 shares of the capital stock of a Nevada corporation. These shares of stock are primarily under the protection of the laws of Nevada, and the complete devolution of the title thereto ordinarily takes place

according to the laws of Nevada. In re Douglas County, 121 N. W. 596. But aside from this, it must be conceded that, by the express terms of the Nevada Inheritance Tax Law, to the extent that the said shares of stock represented the property owned by Henry Miller, deceased, situated in Nevada, it is taxable. Sec. 1, Stats. of Nevada, 1913, p. 411. What, then, becomes of the rule of comity? Can it be employed to pervert the statute law of a sovereign state? We do not think so.

"Few general principles of private international law", says Mr. Minor in his valuable work on Conflict of Laws, Sec. 6, "are so well settled as the rule that no foreign law (even though, under ordinary circumstances, it be the 'proper law') will be enforced in a sovereign State, if to enforce it will contravene the express statute law or an established policy of the forum, or is injurious to its interests."

"If the policy of the forum (says the author) has been expressed in a statute which in terms covers even transactions having a foreign element, no difficulty will be apt to arise."

The legislature of this State has spoken. There can be no question as to its pronounced policy to cover by its Inheritance Tax Law such foreign transactions as is disclosed by this record, and we decline to look to a foreign jurisdiction for an authority either to uphold the law or to evade its provisions. We are not concerned in the *lex loci contractus* if the transfer or devolution of title to the property in question is taxable under our laws.

We do not concede that the opinion of the majority does violence to the rule of comity of decisions between states, in that it conflicts with the opinion of the Supreme Court of California in the case of Nickel et al. v. The State of California, 56 Cal. Dec. 359, 175 Pac. 641. It is true the court held the complaint in that case was good as against the demurrer, but it is inferable from the order and what is said by the court in its opinion that it would be entirely proper and permissible for the State of California, upon issue joined, to show as a matter of fact that the instrument (being the same as that involved in both of these cases) was made "in contemplation of death" and was not made for a "valuable and adequate consideration", and liable to a tax under the statute of California. (Stats. 1911, p. 713, Sec. 1, Subdiv. 3.) In view of the findings of the lower court in the case at bar, and the present status of the case of Nickel et al. v. The State of California, it is strange that counsel for appellants should cite this as an authority for the proposition that the conveyance in question is not taxable.

Our attention has not been directed to any decision of our sister state, or that of any other jurisdiction, that goes to the extent of holding that it is not permissible, for the purpose of claiming an inheritance tax, to attack a transfer and show by extrinsic proof that an instrument of conveyance is subject to the lien of such a tax. If such be the law estates in many cases would pass free from tax. The method usually adopted for the avoidance of such a tax is that pursued in this case. In re Keeney's Estate, 174 N. Y. 281, 87 N. E. 428.

But it is insisted that the trustees accepted the trust; that their active duties began immediately upon the delivery of the deed; that it *contained no power of revocation*, and under the statute of California it was irrevocable. Sec. 2280, C. C. C. Conceding this to be true as between the parties to the transaction, the weakness of the position is that the test in determining whether, under a deed, grant, or gift, the property was intended not to vest in possession or enjoyment until after the death of the grantor, does not depend upon whether a power to revoke has or has not been inserted, but upon whether or not the property passes with all the attributes of ownership, independently of the death of the transferrer. State St. Trust Co. v. Stevens, 209 Mass. 373, 95 N. E. 851.

The learned trial judge, in these cases, and the Inheritance Tax Appraiser of California, in the case of Nickel et al. v. The State of California, supra, found upon identically the same state of facts—that the transfer was made by the decedent Miller in contemplation of death, without valuable and adequate consideration, or valuable or adequate consideration, and the same was intended to take effect in possession and enjoyment as to the grantees and beneficiaries therein named, other than the deceased, at or after the death of said decedent. This being true, it is immaterial, in this case, that the deed was dated and executed before the Inheritance Tax Law of Nevada became effective. It is the vesting of the property in possession and the enjoyment of the same upon the death of the grantor, and after the statute took effect, that renders it liable to the tax; and both those things happened in this case. Crocker v.

Shaw, 54 N. E. 549; In re Green's Estate, 153 N. Y. 223, 47 N. E. 292; In re Seeman's Estate, 149 N. Y. 69, 41 N. E. 401; Inheritance Tax (Gleason and Otis) 90-91. It is this well recognized principle that distinguishes the case at bar from that of Hunt v. Wicht, 174 Cal. 205, 162 Pac. 634, L. R. A. 1917 C, 961.

In view of the above findings it may have been unnecessary for the trial court to find, expressly, that the deed of trust "was made, executed and delivered with the express intent on the part of Henry Miller, deceased, to evade the Inheritance Tax Law of this State", and to find "that said deed of trust is testamentary in character." We concede that if upon any reasonable hypothesis we could bring ourselves to the conclusion that as a matter of law the title to the specific shares of stock vested absolutely in the trustees before the act became effective the motive of the grantor for making the deed would be immaterial, but where it is a question of fact to be determined by the trial court from the nature and character of the conveyance and from all the circumstances surrounding its execution whether the property passed, the motive and the intent of the grantor and the bona fides of the transaction are material elements to be considered in determining whether the transfer is taxable.

We have carefully reviewed the evidence and given the exhaustive briefs our earnest consideration. Our conclusion is that the judgment in the above entitled causes must be affirmed.

SANDERS, J.

I concur:

DUCKER, J.

I dissent, for the reasons given in my opinion filed when the case was originally before us.

COLEMAN, C. J.

(Endorsed): Filed December 9th, 1919.

Wm. Kennett,
Clerk.

JUDGMENTS OF THE SUPREME COURT.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent,

vs.

J. Leroy Nicked and Nellie Miller Nicked, Trustees, etc., et al.,
Appellants.

Appeal from the Second Judicial District Court, Washoe County, Nevada.
Hon. R. C. STODDARD, Judge.

Attorneys:

Cheney, Downer, Price & Hawkins, and Edward F. Treadwell, for appellants;

Leonard B. Fowler, Attorney General, Robert Richards, Deputy Attorney General, for respondent.

A decision having been rendered in the above entitled case on 6th day of January, A. D. 1919, counsel on behalf of appellants, within the time prescribed, filed with the clerk of this court a petition for a rehearing.

Now, on this day all and singular the law and the premises having been seen, heard and duly considered, and again reviewed, and the court being fully advised in the law, files with the clerk of this court its opinion in writing by Sanders, J., concurred in by Ducker, J. (Coleman, C. J., dissenting) to the effect:

"Our conclusion is that the judgment in the above entitled causes (meaning thereby cases No. 2309 and 2310; more particularly being the case: 'Nellie Miller Nickel et al., Appellants, vs. The State of Nevada, Respondent, No. 2309, and case: George A. Cole, as State Controller of the State of Nevada, Respondent, v. J. LeRoy Nickel and Nellie Miller Nickel, Trustees, etc., et al., No. 2310) must be affirmed."

Whereupon, it is now ordered, adjudged and decreed that the judgment of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, in the above entitled case No. 2310, be, and the same is hereby affirmed.

Judgment entered this 9th day of December, A. D. 1919.

Attest: Wm. Kennett,

Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,
Appellants.

NOTICE OF MOTION

FOR WRIT OF ERROR.

To the respondent in the above entitled action and to Messrs. Leonard Fowler, Attorney General, and Robert Richards, Deputy Attorney General, his attorneys:

You and each of you will please take notice that on the 12th day of January, 1920, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, the appellants in the above entitled matter will move said court in the court room thereof, in the Capitol Building, at Carson City, State of Nevada, for an order granting to the said appellants a writ of error to be issued out of the Supreme Court of the United States and directed to said court in said cause to review the final judgment of said court made in said cause on the 9th day of December, 1919.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

(Endorsed): Filed Jany. 2, 1920.

Wm. Kennett,

Clerk.

(Endorsed): Service of the within notice this 2nd day of January, 1920, is hereby admitted.

Leonard B. Fowler,

Attorney General.

Robert Richards,

Deputy Attorney General.

Attorneys for Respondent.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,

Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,

Appellants.

PETITION

FOR WRIT OF ERROR.

To the Honorable, the Supreme Court of the State of Nevada:

Now come the appellants in the above entitled cause and show:

I.

That on the 9th day of December, 1919, this court gave and made its final judgment in said cause affirming the judgment therein.

II.

That the said judgment and decree in said suit was so made in the highest court of the State of Nevada in which a decision in the said suit could be had.

III.

That in said suit there was drawn in question the validity of a statute of the State of Nevada, on the ground of its being repugnant to the Constitution of the United States.

IV.

That in said suit there was drawn in question the validity of an authority exercised under the State of Nevada, on the ground of its being repugnant to the Constitution of the United States.

V.

That in and by the answer of the appellants herein it was set up and alleged as follows:

Further answering the said petition the said defendants allege that at the time of his death the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in said petition, but on the contrary the said Henry Miller transferred and conveyed all of the said property to these defendants by the said deed of trust,

on the 17th day of April, 1913, and the said trustees thereupon became and ever since have been the owners, and in the possession, and entitled to the possession of the same, and the whole thereof, and their rights thereto and therein vested upon the said 17th day of April, 1913, and prior to the date upon which the said act approved March 26th, 1913, went into effect; that the said act is not and was not intended to have any retroactive effect or to apply to any transfers made prior to the date upon which the same went into effect, nor to any estates or rights which vested prior to that time; that if the said act, however, be construed or held to be retroactive or to apply to a transfer made prior to said date, or to rights which vested prior to said date, then the same is to that extent unconstitutional, invalid and void, for the following reasons:

(a) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

(b) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust for a public use, without just compensation, in violation of the fourteenth amendment to the Constitution of the United States.

(c) That the same denies to these defendants and to the beneficiaries under the said deed of trust the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

(d) That the said act impairs the obligation of contracts, in violation of section ten of article I of the Constitution of the United States.

And said defendants hereby invoke the benefit of the said provisions of the Constitution of the United States and of each and all thereof.

VI.

That the decision of this court is in favor of the validity of the said act of the State of Nevada, and is in favor of the validity of the authority exercised under the State of Nevada in this case.

VII.

That this is a proper case to be re-examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error within the meaning of section 237 of the Judicial Code of the United States, as amended September 6, 1916.

VIII.

That in said judgment certain errors were committed to the prejudice of the appellants, all of which will appear in detail from the assignment of errors which is filed with this petition.

Wherefore, these appellants pray that a writ of error in their behalf issue out of the Supreme Court of the United States, and that said appellants be allowed to prosecute the same in the said last mentioned court for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in said cause, duly authenticated, may be forwarded to the

Supreme Court of the United States, and that an order be made fixing the amount of the supersedeas bond which the said appellants shall give and furnish on said writ of error, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded until the determination of said writ of error by the Supreme Court of the United States.

Dated: January 12th, 1920.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

(Endorsed): Filed Jany 12, 1920.

Wm. Kennett,
Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent.

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,
Appellants.

ASSIGNMENT OF ERRORS.

Now come the appellants in the above entitled cause, and in connection with their petition for writ of error

in the above entitled cause make the following assignment of errors which they aver occurred in said cause, and upon which they will urge their writ of error in the above entitled action, to wit:

I.

The court erred in holding that the act of the State of Nevada, known as chapter 266 of the laws of Nevada of 1913, imposing a transfer tax on a deed of trust, made, executed and delivered on the 17th day of April, 1913, and prior to said act going into effect, was not in violation of the Constitution of the United States.

II.

The court erred in holding that the said act of the Legislature of the State of Nevada, imposing such a tax did not take the property of the appellants without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

III.

The court erred in holding that the imposing of said tax did not tax the property of the appellants for a public use without just compensation, in violation of the fourteenth amendment to the Constitution of the United States.

IV.

The court erred in holding that said act in imposing said tax upon said transfer does not deny to the appellants the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

V.

The court erred in holding that said act in imposing said tax does not impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

VI.

The court erred in holding that the authority exercised under said act of the State of Nevada does not take the property of appellants without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

VII.

The court erred in holding that the authority exercised under the said act of the State of Nevada does not take the property of appellants for a public use without just compensation, in violation of the fourteenth amendment to the Constitution of the United States.

VIII.

The court erred in holding that the authority exercised under the authority of the said act of the Legislature of the State of Nevada does not deny to the appellants the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

IX.

The court erred in holding that the authority exercised under the said act of the legislature does not impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

X.

The court erred in holding that if the said act of the State of Nevada be construed to have a retroactive effect, or to apply to transfers made prior to the date upon which the same went into effect, or to estates or rights which vested prior to that time, it would not be unconstitutional or in violation of the Constitution of the United States, and would not take the property of the appellants without due process of law, in violation of the fourteenth amendment to the Constitution of the United States, and would not take the property of appellants for a public use without due compensation, in violation of the fourteenth amendment of the Constitution of the United States, and would not deny to the appellants the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States, and would not impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

Wherefore, said appellants pray that the said judgment may be reversed.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

(Endorsed): Filed Jany 12, 1920.

Wm. Kennett,
Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent,
vs.
J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,
Appellants.

ORDER

ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

On this 12th day of January, 1920, came the appellants by their attorneys, and filed herein and presented their petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

And it appearing that the final judgment in this cause was rendered in the highest court of the State of Nevada in which a decision in said suit could be had, and that there was therein drawn in question the validity of a statute of and an authority exercised under the State of Nevada, on the ground of their being repugnant to the

Constitution of the United States, and that the decision herein is in favor of their validity, and that this is a case which may properly be re-examined, reversed or affirmed in the Supreme Court of the United States upon writ of error.

In consideration whereof, it is ordered and the court hereby orders that a writ of error as prayed for in said petition be allowed, and that the amount of the supersedeas bond to be given by the appellants and upon said writ of error be and the same is hereby fixed at the sum of $1000.00, and that upon the giving of said bond all further proceedings in this court by suspended, stayed and superseded pending the determination of said writ of error by the Supreme Court of the United States.

Dated this 12th day of January, 1920.

B. W. Coleman,
Chief Justice.

(Endorsed): Filed Jany 12, 1920.

Wm. Kennett,
Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada.

Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,

Appellants.

WRIT OF ERROR.

United States of America.—ss.

The President of the United States of America to the Supreme Court of the State of Nevada, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a cause which is in the said Supreme Court of the State of Nevada before you, between George A. Cole, as State Controller of the State of Nevada, plaintiff, and J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, made and intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine

Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Probasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson, and First English Evangelical Lutheran Church, defendants, a manifest error hath happened, to the great damage of the defendants, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, to under your seal distinctly and openly send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Colum-

bia, on the 12th day of March, 1920, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid may be inspected and the Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Edward D. White, Chief Justice of the Supreme Court of the United States, this twelfth, day of January, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fourth.

(Seal of the Court) B. W. Coleman,
Chief Justice of the Supreme Court
of the State of Nevada.

Attest:
Wm. Kennett,
Clerk.

I hereby certify that a copy of the within writ of error was on the 12th day of January, 1920, lodged in the clerk's office of the Supreme Court of the State of Nevada for the said defendant in error.

(Seal of the Court) Wm. Kennett,
Clerk of the Supreme Court
of the State of Nevada.

(Endorsed): Filed Jany 12, 1920.
Wm. Kennett,
Clerk.

(Endorsed): Service of the within writ of error is hereby acknowledged this 12th day of January, 1920.

Leonard B. Fowler,
Attorney General,
Robert Richards,
Deputy Attorney General.
Attorneys for Defendant in Error.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,
Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,
Appellants.

CITATION.

United States of America,—ss.

To The State of Nevada, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the City of Washington, District of Columbia, on the 12th day of March, 1920, pursuant to a writ of error on file in the clerk's office of the Supreme Court of the State of Nevada, in that certain

action, No. 2310, wherein George A. Cole, as State Controller of the State of Nevada, is the defendant in error, and J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, made and intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Rickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Probasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry

Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson and First English Evangelical Lutheran Church, are the plaintiffs in error, to show cause, if any there be, why the judgment given, made and entered against the said plaintiffs in error in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. B. W. Coleman, Chief Justice of the Supreme Court of the State of Nevada, this twelfth day of January, in the year of our Lord one thousand nine hundred and twenty, and of the independence of the United States the one hundred and forty-fourth.

B. W. COLEMAN,
Chief Justice of the Supreme Court
of the State of Nevada.

Service of the foregoing citation is hereby acknowledged this 12th day of January, 1920.

Leonard B. Fowler,
Attorney General,
Robert Richards,
Deputy Attorney General,
Attorneys for Plaintiff in Error.

(Endorsed): Filed Jany. 12th, 1920.
Wm. Kennett,
Clerk.

Know all men by these presents, that we, J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and

J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, and made and intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Probasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson and First English Evangelical Lutheran Church, as principals, and J. B. Humphrey and J. L. Humphrey as sureties, are held and firmly bound unto George

A. Cole, as State Controller of the State of Nevada, in the full and just sum of one thousand dollars ($1,000), to be paid to the said George A. Cole, as State Controller of the State of Nevada; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 14th day of January, in the year of our Lord one thousand nine hundred and twenty;

Whereas, lately in the Supreme Court of the State of Nevada, in a suit pending in said court, between the principals above named, appellants, and George A. Cole, as State Controller of the State of Nevada, respondent, a judgment was rendered against the said above named principals, and the said above named principals have sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the aforesaid suit, and a citation directed to the said George A. Cole, as State Controller of the State of Nevada, citing and admonishing him to be and appear at the Supreme Court of the United States, to be held in the City of Washington, District of Columbia within sixty days after the service of said citation.

Now, the condition of the above obligation is such, that if the said above named principals shall prosecute said writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

In witness whereof, the parties herein named as sureties have caused their signatures to be affixed this 14th day of January, 1920.

J. B. Humphrey (Seal)
J. L. Humphrey (Seal)

State of Nevada,
County of Washoe.—ss.

J. B. Humphrey and J. L. Humphrey, being first duly sworn, each for himself, deposes and says: that he is a resident householder within the State of Nevada, and is worth the sum specified in the foregoing undertaking, over and above all of his just debts and liabilities, exclusive of property exempt from execution.

J. B. Humphrey.
J. L. Humphrey.

Subscribed and sworn to before me this 14th day of January, 1920.

(Notarial Seal) J. W. Davey,
Notary Public in and for the County of Washoe,
State of Nevada.

Approved.

B. W. Coleman,
Chief Justice.

(Endorsed): Filed Jany. 14, 1920,
Wm. Kennett,
Clerk.

In the Supreme Court of the State of Nevada.

No. 2310

George A. Cole, as State Controller of the State of Nevada,

Respondent,

vs.

J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al.,

Appellants.

STIPULATION

DESIGNATING PORTIONS OF THE RECORD TO BE INCLUDED IN TRANSCRIPT.

It is hereby stipulated by and between the parties to the above entitled cause that the following portions of the record in said cause shall constitute the transcript on writ of error to the Supreme Court of the United States, viz.:

The transcript on appeal in said cause and the whole thereof.

The opinion and order of the Supreme Court of the State of Nevada therein affirming the order, judgment and decree appealed from.

The dissenting opinion of Coleman, J.

The order of the Supreme Court of the State of Nevada granting a rehearing of said cause.

The opinion and order of the Supreme Court of the State of Nevada on rehearing.

The dissenting opinion on rehearing of Coleman, C. J.

Appellants' notice of motion for writ of error.

Appellants' petition for writ of error.

Appellants' assignment of errors.

Order allowing writ of error and fixing amount of supersedeas bond.

Writ of error.

Citation.

Supersedeas bond.

Dated, January 12, 1920.

LEONARD B. FOWLER,
Attorney General,
ROBERT RICHARDS,
Deputy Attorney General,
Attorneys for Respondent.

CHENEY, DOWNER, PRICE & HAWKINS,
EDWARD F. TREADWELL,
Attorneys for Appellants.

(Endorsed): Filed Jany 12, 1920.
Wm. Kennett,
Clerk.

UNITED STATES OF AMERICA,
State of Nevada, ss:

I, William Kennett, Clerk of the Supreme Court of the State of Nevada, hereby certify that the foregoing, consisting of Transcript of Appeal, containing six hundred thirty-four (634) pages, and Transcript of Proceedings in the Supreme Court, containing sixty-three (63) pages, constitutes a full, true and correct copy of the Transcript of Appeal in the case of George A. Cole, as State Controller of the State of Nevada, Respondent, vs. J. Leroy Nickel, et al., Appellants, No. 2310, and a full, true and correct copy of the Proceedings in said cause in the said Supreme Court of the State of Nevada, and a full, true and correct copy of the papers set forth in the Stipulation, designating portions of the record to be included in transcript, and that all of said papers are on file and of record in my office in said Court, and constitute the record on the Writ of Error in said cause.

In witness whereof, I have hereunto set my hand and affixed my official seal this 2nd day of March, 1920.

[Seal of Supreme Court, State of Nevada.]

WM. KENNETT,
Clerk of the Supreme Court of the State of Nevada.

Endorsed on cover: File No. 27,530. Nevada Supreme Court. Term No. 268. J. Leroy Nickel and Nellie Miller Nickel, as trustees, &c., et al., plaintiffs in error, vs. George A. Cole, as State controller of the State of Nevada. Filed March 8th, 1920. File No. 27,530.

In the Supreme Court of the United States, October Term, 1919.

No. 775.

J. LEROY NICKEL et al., Plaintiffs in Error,

vs.

GEORGE A. COLE, as State Controller of the State of Nevada, Defendant in Error.

Motion for Leave to File Amended Writ of Error.

To the honorable the Supreme Court of the United States:

Now come the plaintiffs in error in the above entitled cause, and respectfully ask leave to amend the writ of error in the above entitled cause and to file an amended writ of error therein, and in support of said motion show:

That on the 12th day of January, 1920, a writ of error to the Supreme Court of the State of Nevada was duly allowed by the Chief Justice of the Supreme Court of the State of Nevada, and thereupon a writ of error from this court to the Supreme Court of the State of Nevada was issued by the Chief Justice of the Supreme Court of the State of Nevada and by the clerk thereof, and under the seal thereof, and thereafter the said writ of error, together with a certified copy of the record was duly returned by the Clerk of said Supreme Court of the State of Nevada, and filed and docketed herein.

That according to the practice of this court the said writ of error should have been attested by the Clerk of the United States District Court for the District of Nevada.

Ex parte Ralston, 199 Fed. 115.
Buel v. Van Ness, 8 Wheaton, 312.
Miller v. Texas, 153 U. S. 535.

An amended writ of error has since been issued and attested by the Clerk of the United States District Court for the District of Nevada, which is attached to this motion, for the purpose of remedying the defect in the original writ, and which is subject to the amendment in the particular mentioned.

Miller v. Texas, 153 U. S. 535.

AZRO E. CHENEY,
EDWARD F. TREADWELL,
Attorneys for Plaintiffs in Error.

To the defendant in error in the above entitled cause:

You will please take notice that the foregoing motion will be submitted to the Supreme Court of the United States on the 12th day of April, 1920, at the hour of twelve o'clock noon, or as soon there-

after as counsel can be heard, in the court room of said court, in the City of Washington, District of Columbia.

AZRO E. CHENEY,
EDWARD F. TREADWELL,
Attorneys for Plaintiffs in Error.

Received a copy of the foregoing motion and notice this 1st day of April, 1920.

S. B. FOWLER,
Attorney General of Nevada;
ROBERT RICHARDS,
Deputy Att'y Gen. of Nev.,
Attorneys for Defendant in Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nevada, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Nevada, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George A. Cole, as State Controller of the State of Nevada, Plaintiff, and J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust dated April 17, 1913, from Henry Miller, deceased, to said trustees, and made and intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Denney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Prolasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson and First English Evangelical Lutheran Church, defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their

being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; a manifest error hath happened to the great damage of the said J. Leroy Nickel and Nellie Miller Nickel, trustees under the last will and testament of Henry Miller, deceased, and J. Leroy Nickel and Nellie Miller Nickel, trustees under a certain deed of trust, dated April 17, 1913, from Henry Miller, deceased, to said trustees, and made and intended to take effect in possession and enjoyment after the death of Henry Miller, now deceased, Nellie Miller Nickel, individually, J. Leroy Nickel, individually, George W. Nickel, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Bedell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Probasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. F. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Bader, Mrs. Henry Bader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson and First English Evangelical Lutheran Church, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 26th day of March, in the year of our Lord one thousand nine hundred and twenty.

[Seal of the U. S. District Court, District of Nevada.]

T. J. EDWARDS,
Clerk of the United States District
Court for the District of Nevada.

Allowed by:
BENJ. W. COLEMAN,
Chief Justice of the Supreme Court
of the State of Nevada.

[Endorsed:] Supreme Court of the United States, October Term, 1919. J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al., Plaintiffs in Error, vs. George A. Cole, as State Controller of the State of Nevada, Defendant in Error. Amended Writ of Error.

[Endorsed:] 775/27530. No. 775. In the Supreme Court of the United States, October Term, 1919. J. Leroy Nickel et al., Plaintiffs in Error, vs. George A. Cole, as State Controller of the State of Nevada, Defendant in Error. Motion for Leave to File Amended Writ of Error. Azro E. Cheney, Reno, Nevada, Edward F. Treadwell, attorneys-at-law, 1323 Merchants Exchange Building, San Francisco, California.

[Endorsed:] File No. 27530. Supreme Court U. S., October Term, 1920. Term No. 268. J. Leroy Nickel et al., Pffs in Error, vs. George A. Cole, as State Controller, etc. Motion for leave to file amended writ of error, with notice and proof of service, and amended writ of error. Filed April 9, 1920.

NOS. ~~775~~ & ~~776~~

In the Supreme Court of the United States

OCTOBER TERM, 1919.

Supreme Court, U.S.
FILED
MAR 9 1920
JAMES D. MAHER
CLERK

J. Leroy Nickel and Nellie Miller Nickel, Trustees Under the Last Will and Testament of Henry Miller, Deceased, and J. Leroy Nickell and Nellie Miller Nickel, Trustees Under a Certain Deed of Trust, Dated April 17th, 1913, from Henry Miller, Deceased, to Said Trustees, and Made and Intended to Take Effect in Possession and Enjoyment After the Death of Henry Miller, now Deceased, Nellie Miller Nickel, Individually, J. Leroy Nickel, Individually, George W. Nickell, Beatrice Sarah Nickel, J. Leroy Nickel, Jr., Sarah Miller Nickel, Sarah E. Miller, Minnie Pfeiffer Sheldon, Josephine Sheldon Kickham, Jeremiah Sheldon, Mildred Sheldon Cornett, Sarah Long Brown, Mary Long, Raymond Long, Elizabeth Long Barry, Frank Barry, George Barry, Hazel Barry, Nellie Long Whittington, Henry Long, Albert Pfeiffer, Martha Rembold, Albert Alexander Rembold, Henry Gustave Rembold, David Aaron Rembold, Nathan Herman Rembold, Gus A. Lastine, Nacisio Castro, Jesus Lopez, William Redell, M. V. Deeney, San Francisco Home for Incurables, Minnie Elizabeth Pfeiffer Turner, Henry Long Pfeiffer, Albert Pfeiffer, Jr., Gustave Rembold Maas, Philip Rembold Maas, Gustave Rembold, Nancy Prohasco, Anna Sibley Robinson, Joseph Place, Dorothy Otto, Richard Brem, Christina Fisher Brem, Henry Brem, George Brem, Richard Brem, Jr., Charles Z. Merritt, Edwin G. Rodolph, David Brown, John Dillon, William Mitchell, Charles Reddy, E. V. Ogle, Hugh T. Gower, Edwin M. Jordan, Henry Rader, Mrs. Henry Rader, H. C. Safstrom, Benjamin Miller, Henry Pfeiffer, J. Rock Tofalo, Louis Gonzales, M. M. Thomas, M. C. Wilson and First English Evangelical Lutheran Church,

Petitioners,

vs.

George A. Cole, as State Controller of the State of Nevada,

Respondent.

Nellie Miller Nickel and J. Leroy Nickel, as Trustees under that certain Deed of Trust, dated April 17th, 1913, made, executed and delivered by Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as Trustees, and recorded in Book 972 of Deeds (N. S.), page 170, in the County Recorder's Office of the City and County of San Francisco, State of California,

Petitioners,

vs.

State of Nevada,

Respondent.

PETITION FOR WRIT OF CERTIORARI, MOTION, NOTICE AND BRIEF

EDWARD F. TREADWELL,
AZRO E. CHENEY,
Attorneys for Petitioners.

Filed this ..... day of March, 1920.

.....Clerk.

By .....Deputy Clerk.

In the Supreme Court
of the
United States

OCTOBER TERM, 1919.

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees Under the Last Will and Testament of Henry Miller, Deceased, and J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees Under a Certain Deed of Trust, Dated April 17th, 1913, from Henry Miller, Deceased, to Said Trustees, and Made and Intended to Take Effect in Possession and Enjoyment After the Death of Henry Miller, Now Deceased, NELLIE MILLER NICKEL, Individually, J. LEROY NICKEL, Individually, GEORGE W. NICKEL, BEATRICE SARAH NICKELL, J. LEROY NICKEL, JR., SARAH MILLER NICKEL, SARAH E. MILLER, MINNIE PFEIFFER SHELDON, JOSEPHINE SHELDON KICKHAM, JEREMIAH SHELDON, MILDRED SHELDON CORNETT, SARAH LONG BROWN, MARY LONG, RAYMOND LONG, ELIZABETH LONG BARRY, FRANK BARRY, GEORGE BARRY, HAZEL BARRY, NELLIE LONG WHITTINGTON, HENRY LONG, ALBERT PFEIFFER, MARTHA REMBOLD, ALBERT ALEXANDER REMBOLD, HENRY GUSTAVE REMBOLD, DAVID AARON REMBOLD, NATHAN HERMAN REMBOLD, GUS A. LASTINE, NACISIO CASTRO, JESUS LOPEZ, WILLIAM BEDELL, M. V. DEENEY, SAN FRANCISCO HOME FOR INCURABLES, MINNIE ELIZABETH PFEIFFER TURNER, HENRY LONG PFEIFFER, ALBERT PFEIFFER, JR., GUSTAVE REMBOLD MAAS, PHILIP REMBOLD MAAS, GUSTAVE REMBOLD, NANCY PROBASCO, ANNA SIBLEY ROBINSON, JOSEPH PLACT, DOROTHY OTTO, RICHARD BREM, CHRISTINA FISHER BREM, HENRY BREM, GEORGE BREM, RICHARD BREM, JR., CHARLES Z. MERRITT, EDWIN G. RODOLPH, DAVID BROWN, JOHN DILLON, WILLIAM MITCHELL, CHARLES REDDY, E. F. OGLE, HUGH T. GOWER, EDWIN M. JORDAN, HENRY BADER, MRS. HENRY BADER, H. C. SAFSTROM, BENJAMIN MILLER, HENRY PFEIFFER, J. ROCK TOFALO, LOUIS GONZALES, M. M. THOMAS, M. C. WILSON and FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH,

Petitioners,

vs.

GEORGE A. COLE, as State Controller of the State of Nevada,

Respondent.

NELLIE MILLER NICKEL and J. LEROY NICKEL, as Trustees under that certain Deed of Trust, dated April 17th, 1913, made, executed and delivered by Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as Trustees, and recorded in Book 972 of Deeds (N. S.), page 170, in the County Recorder's Office of the City and County of San Francisco, State of California,

Petitioners,

vs.

STATE OF NEVADA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO BE DIRECTED TO THE SUPREME COURT OF THE STATE OF NEVADA TO BRING BEFORE THIS HONORABLE COURT THE CASES NUMBERED 2310 AND 2309 THERE PENDING.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners above named hereby petition said court for a writ of *certiorari* to be directed to the Supreme Court of the State of Nevada to bring before this honorable court two cases pending therein, and entitled: "George A. Cole, as State Controller of the State of Nevada, respondent, vs. J. Leroy Nickel and Nellie Miller Nickel, trustees etc. et al., appellants, No. 2310," and "Nellie Miller Nickel and J. Leroy Nickel, as trustees etc., appellants, vs. State of Nevada, respondent, No. 2309," and in support of said petition respectfully show:

I.

The two cases above referred to were consolidated for argument in the Supreme Court of the State of Nevada and were finally decided by said court on the 9th day of December, 1919; that court being the highest court of the State of Nevada in which a decision in said causes could be had.

II.

Thereafter and on the 12th day of January, 1920, writs of error were duly issued out of this court, directed to the Supreme Court of the State of Nevada,

to review the judgments in said causes, the said writs of error having been granted by the Chief Justice of the Supreme Court of the State of Nevada, and pursuant to the said writs of error the records in both of said causes have been duly transmitted to and deposited in this court, and docketed therein.

III.

The first of said cases is a statutory proceeding brought by the State Controller of the State of Nevada for the purpose of collecting a transfer or inheritance tax claimed by the State of Nevada under an act of the State of Nevada, approved March 26, 1913, but which, by the express terms of the act, did not go into effect until April 25, 1913, upon a transfer made by one Henry Miller to the petitioners on April 17th, 1913, *and before the effective date of the act in question.*

The second case is a statutory suit to quiet title, brought by the petitioners, as trustees under said deed, against the claim for such transfer or inheritance tax made by the State of Nevada.

IV.

In their answer, in the first case, the petitioners herein set up and alleged as follows:

> Further answering the said petition the said defendants allege that at the time of his death the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in said petition, but on the contrary the said Henry Miller transferred and conveyed all of the said property to

these defendants by the said deed of trust, on the 17th day of April, 1913, and the said trustees thereupon became and ever since have been the owners, and in the possession, and entitled to the possession of the same, and the whole thereof, and their rights thereto and therein vested upon the said 17th day of April, 1913, and prior to the date upon which the said act approved March 26th, 1913, went into effect; that the said act is not and was not intended to have any retroactive effect or to apply to any transfers made prior to the date upon which the same went into effect, nor to any estates or rights which vested prior to that time; that if the said act, however, be construed or held to be retroactive or to apply to a transfer made prior to said date, or to rights which vested prior to said date, then the same is to that extent unconstitutional, invalid and void, for the following reasons:

(a) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

(b) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust for a public use, without just compensation, in violation of the fourteenth amendment to the Constitution of the United States.

(c) That the same denies to these defendants and to the beneficiaries under the said deed of trust the equal protection of the laws, in violation of the fourteenth amendment to the Constitution of the United States.

(d) That the said act impairs the obligation of contracts, in violation of section ten of article I of the Constitution of the United States.

And said defendants hereby invoke the benefit of the said provisions of the Constitution of the United States, and of each and all thereof.

In the exceptions of the appellants to the findings and request for additional findings in the second case, the petitioners herein made the following request:

> Said plaintiffs hereby request the court to make the following additonal finding, to-wit: "That all of the said shares of stock vested in the said trustees and the interests of the several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax laws of the State of Nevada became effective and that the same were not subject to an inheritance tax or a transfer tax under the provisions of the said act, and that said act was not retroactive and did not intend to tax a transfer which took place before the effective date of the said act, and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the plaintiffs and of the beneficiaries under said deed of trust without due process of law, in violation of the 14th amendment to the Constitution of the United States, and would take the property of the plaintiffs and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the 14th amendment to the Constitution of the United States; that the same would deny to the plaintiffs and to the beneficiaries under said deed of trust the equal protection of the laws, in violation of the 14th amendment to the Constitution of the United States and impair the obligation of contracts, in violation of section 10 or article I of the Constitution of the United States."

And, in their specifications of particulars in which the evidence was insufficient to justify the findings in said cause, said petitioners specified as follows:

In this, that the court failed to find that all of said shares of stock vested in said trustees and the interests of said several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective, and that the same were not subject to the inheritance tax or transfer tax under the provisions of the said act, and that said act was not retroactive, and did not intend to tax the transfer which took place before the effective date of the said act, and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the plaintiffs and of the beneficiaries under said deed of trust without due process of law, in violation of the 14th amendment to the Constitution of the United States, and would take the property of the plaintiffs and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the 14th amendment to the Constitution of the United States; that the same would deny to the plaintiffs and to the beneficiaries under said deed of trust the equal protection of the law, in violation of the 14th amendment to the Constitution of the United States, and impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

V.

That in both of said causes the Supreme Court of the State of Nevada so applied the said act of the State of Nevada as to impose a transfer tax on the said transfer so made prior to the effective date of said act.

VI.

That in each of said cases a title, right, privilege or immunity was claimed by these petitioners under the Constitution of the United States, and the decision of the Supreme Court of the State of Nevada was against the title, right, privilege or immunity especially set up and claimed by petitioners under such constitution.

VII.

Since the amendment to Section 237 of the Judicial Code, classifying cases subject to review by this court, so that certain of them may be reviewed on writ of error and certain of them by writ of *certiorari*, it becomes necessary to carefully consider in each case whether the case is properly reviewable by writ of error or writ of *certiorari*, or both. In certain aspects of these cases, they are reviewable by writs of error as being cases

> "where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution * * * of the United States, and the decision is in favor of their validity."

In other aspects, the cases are reviewable by writ of *certiorari* as being cases

> "where any title, right, privilege or immunity is claimed under the constitution, * * * and the decision is either in favor of or against the title, right, privilege or immunity, especially set up or claimed, by either party, under such constitution."

We take it that if the statute in question expressly purported to be retroactive and to impose a transfer tax upon a transfer made prior to the act going into effect, the question would be a clear question of the constitutionality of the act itself, and would be clearly reviewable by writ of error; numerous acts of that character having been many times held to be unconstitutional. (See cases cited in point I of brief.)

On the other hand, if the Supreme Court of the State expressly interpreted some provision of the act as making it retroactive and intended to apply to a transfer made before it went into effect, the question would still be purely one as to the constitutionality of the act, and the decision could be reviewed by writ of error, since on writ of error the validity of the act as construed by the highest court of the State may be reviewed.

On the other hand, if the act is not on its face made retroactive or applicable to such a transfer, and the court does not expressly construe any provision of it as making it retroactive, but the parties claim the benefit of some privilege or immunity under the Constitution of the United States, for instance, guaranteeing them against the deprivation of property without due process of law, which it is alleged will result by the application of the act to the particular transaction in question, and the court refuses to pass upon or enforce the privilege or immunity relied upon, then the case would seem clearly to come within the class of cases to be reviewed by *certiorari*.

Again, if the petitioners have been deprived of their property without due process of law because there was

no law whatever, either constitutional or unconstitutional, imposing the burden in question, then the case would be one where they have been by the operation of the judicial power of the State deprived of the constitutional right and immunity relied upon, and the case would be properly reviewable by *certiorari*.

VIII.

The Supreme Court of Nevada rendered two decisions in these cases. The first decision was written by Sanders, J., and concurred in by McCarran, C. J., Coleman, J., dissenting. The second decision was written by Sanders, J., and concurred in by Ducker, J., Coleman, C. J., dissenting. It is quite difficult to determine therefrom the exact manner in which the court finally avoided the constitutional question involved.

In the first decision it was held that the deed was subject to revocation, but on rehearing it was shown that under the law of California, where the deed was executed, as well as under the general law, it was not subject to revocation. It was also shown that even if subject to revocation it created vested rights equally protected by the Constitution. (See cases cited in points III, IV and IX of brief.) And this contention was expressly withdrawn in the decision on rehearing.

In the first decision it was suggested that the deed was testamentary in character, but on rehearing it was pointed out that the instrument operated as a deed and not as a will, and that both the pleadings, findings and judgment alleged, found and adjudged that it was a

it could be construed to be retroactive or to apply to such a deed.

Notwithstanding this, the court has by its judgment made the act applicable to the deed in question, which was executed and delivered before the effective date of the act. The decision, therefore, is to the effect that the interests created by the deed are subject to the act, and the mere failure, if any exists, of the court to pass upon the constitutionality of so making it applicable thereto cannot prevent a review in this court. In other words, where a right or immunity is asserted under the Constitution, the court cannot prevent a review by in any way failing to pass upon the validity of that claim of right or immunity under the Constitution. (See cases cited in point XI of the brief.) It is thus evident that these cases in the nature of things could not be decided without passing upon the Federal question involved.*

IX.

The suggestion of the opinion that vested rights did not inure to the petitioners at the date of the execution and delivery of the deed we will show on final hearing to be merely colorable and without any sufficient support to avoid the necessity of a decision on

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*The portions of the act necessary to a decision in these cases are as follows (Chap. 266, Stats. of Nevada, 1913, p. 411 [approved March 25, 1913]):

"Sec. 1. A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this state * * * which *shall* pass in trust or otherwise by will or by the statutes of inheritance of this or any other state or by deed, grant, sale or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act.

"Sec. 31. This act shall take effect thirty days from and after the date of its approval."

the constitutional question, if it is disputed, or to avoid the clear application of the constitutional principle, if it is admitted, for it will be shown that the pleadings, findings and judgment in the cases allege, find and adjudge that the deed was made, executed and delivered before the effective date of the act, and, of course, by general principles of law, rights under a deed vest upon its execution and delivery, irrespective of whether the estates created are present, future, limited, conditional, defeasible, absolute or indefeasible, and there was no question of local law which was made or could be made the basis of the decision.

For these reasons it is a clear case where a right, privilege or immunity is claimed under the Constitution by the petitioners, and in which the decision is against the right, privilege or immunity especially set up.

X.

As is shown by the decisions cited in the brief on this application, the courts of New York, Minnesota, Iowa, North Carolina, Virginia, California and Maryland all hold that to apply such an act to a deed of this character, executed and delivered before the effective date of the act, deprives the parties claiming under such a deed of the privileges and immunities guaranteed to them by the Constitution of the United States, and the decision herein is therefore with respect to an important constitutional principle, and is out of line with the current of authority throughout the United States.

MISSING

XI.

The deed in question was made, executed and delivered in the State of California, by residents of the State of California, and with respect to property actually in the State of California, and only constructively in the State of Nevada (being shares of stock in a Nevada corporation owned in California), and the decision is directly contrary to the decision of the Supreme Court of the State of California with respect to the same deed, in which it was held that the same could not constitutionally be taxed by an act passed after its execution and delivery. The cases, therefore, involve important questions of constitutional law, as to which the decision here sought to be reviewed is contrary to the decision of the Supreme Court of another State, and for that reason also is one proper to be reviewed by this court.

XII.

From still another point of view the cases are proper ones for review by *certiorari*, for the reason that the judgments require not only the trustees under the deed of trust in question to pay the tax claimed, but also require its payment by the executors of the last will and testament of Henry Miller, deceased. The property claimed to be subject to this tax is certain shares of the capital stock of a corporation incorporated under the laws of the State of Nevada, and those shares of stock were transferred by the deed of trust to the trustees and formed no part of the estate of Henry Miller coming into the possession of the ex-

PAGES

ecutors of his will, and he left no other property within the State of Nevada and was not a resident thereof. The property having been transferred by the deed of trust, and not belonging to his estate, the judgments imposing this tax upon his executors certainly took the property of his estate without due process of law. On the other hand, if the property was not transferred by the deed of trust, the judgments requiring the trustees under the deed of trust to pay the tax took their property without due process of law. From any point of view, therefore, the petitioners were deprived of the privileges and immunities under the Constitution of the United States relied upon by them.

For the foregoing reasons your petitioners believe that the aforesaid rulings are erroneous, and that this honorable court should require said causes to be certified to it for review and determination in conformity with the provisions of the Act of Congress in such cases made and provided.

WHEREFORE, your petitioners pray that a writ of *certiorari* may issue out of and under the seal of this court, directed to the Supreme Court of the State of Nevada, commanding the said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said Supreme Court of the State of Nevada in the cases therein entitled: "George A. Cole, as State Controller of the State of Nevada, respondent, vs. J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al., appellants, No. 2310," and "Nellie Miller Nickel and J. Leroy Nickel, as

trustees, etc., appellants, vs. State of Nevada, respondent, No. 2309," to the end that said cases may be reviewed and determined by this court, and that said judgments of said Supreme Court of the State of Nevada in said causes, and every part thereof, may be reversed by this honorable court.

EDWARD F. TREADWELL,
AZRO E. CHENEY,
Attorneys for Petitioners.

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

EDWARD F. TREADWELL, being first duly sworn, deposes and says: That he is one of the counsel for the petitioners above named; that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

Subscribed and sworn to before me this 13th day of February, 1920.

James O'Brien Notary Public, in and for the City and County of San Francisco, State of California.

EDWARD F. TREADWELL.

UNITED STATES OF AMERICA,
STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO. } ss.

I, EDWARD F. TREADWELL, attorney and counsellor at law, admitted to practice in the Supreme Court of

the United States, hereby certify that I have examined the foregoing petition for writ of *certiorari;* that the same is not made for the purpose of delay, and that in my opinion said petition is meritorious and well-founded in law, and ought to be granted and the writ issued.

EDWARD F. TREADWELL,
Counsel.

In the Supreme Court of the United States.

October Term, 1919.

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees, etc., et al.,
Petitioners,
vs.
GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent.
} No. 2310.

NELLIE MILLER NICKEL and J. LEROY NICKEL, as Trustees, etc.,
vs.
STATE OF NEVADA,
Respondent.
} No. 2309.

MOTION FOR WRIT OF CERTIORARI.

Come now the petitioners above named, by their undersigned counsel, and move this honorable court to require by writ of *certiorari*, directed to the Supreme Court of the State of Nevada, the said court to certify to this court for its review and determination those certain cases in said Supreme Court of the State of Nevada lately pending, entitled: "George A. Cole, as State Controller of the State of Nevada, respondent, vs. J. Leroy Nickel and Nellie Miller Nickel, trustees, etc., et al., appellants, No. 2310," and "Nellie Miller Nickel and J. Leroy Nickel, as trustees, etc., appellants, vs. State of Nevada, respondent, No.

2309," and to that end now present herewith their petition with a certified copy of the entire record in said cases.

EDWARD F. TREADWELL,
AZRO E. CHENEY,
Attorneys for Petitioners.

In the Supreme Court of the State of Nevada.

GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent.

vs.

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees, etc., et al.,
Appellants.

NELLIE MILLER NICKEL and J. LEROY NICKEL, as Trustees, etc.,
Appellants,

vs.

STATE OF NEVADA,
Respondent.

NOTICE OF APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR WRITS OF CERTIORARI.

The respondents in the above-entitled causes are hereby notified that the appellants in the above-entitled causes will on Monday, the 15th day of March, 1920, by their verified petition and a copy of the entire record in the said causes, at the opening of the court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which and of the petition for writ of *certiorari* as above set forth and brief in support thereof are hereby delivered to you) to the Supreme Court of the United States, at its court room at the Capitol, in the City of Washington, District of Columbia.

EDWARD F. TREADWELL,
AZRO E. CHENEY,
Attorneys for Appellants.

INDEX OF CASES CITED IN BRIEF

CASE PAGE

Attorney-General of Michigan v. Lowrey, 199 U. S. 233, 50 L. ed. 167 35

Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 Pac. 370 32
Burn v. Carvallo, 1 A. & E. 883, 28 E. C. L. 408, 4 N. & M. 889, 30 E. C. L. 622 32

Caperton v. Bowyer, 14 Wall. 216, 20 L. ed. 882 38
Carter v. Whitcomb (1918), 74 N. Y. 482, 69 Atl. 779 30
Chapman, Matter of (1909), 117 N. Y. S. 979 ..... 28, 30
Chicago, B. & Q. Ry. v. Illinois, 200 U. S. 561, 50 L. ed. 596 35
Citizens' Bank of Los Angeles v. Parker, 192 U. S. 73, 48 L. ed. 349 35
Commonwealth v. McCauley's Executor (1915), 166 Ky. 450, 179 S. W. 411 29
Commonwealth v. Wellford (1913), 114 Va. 372, 76 S. E. 917 ..... 28, 30
Copp v. Gunther, 95 Cal. 93, 30 Pac. 301 32
Corn Products Refining Co. v. Eddy (1918-19), No. 13 U. S. Sup. Ct. Adv. Op. 398 35
Craig, Matter of (1904), 89 N. Y. S. 971, 97 App. Div. 289 ..... 28, 29

Denert v. Purdy, 29 Penn. St. 113 32

Eury's Executors v. State (1905), 72 Ohio St. 448, 74 N. E. 650 30

Felton, Estate of (1917), 176 Cal. 663, 169 Pac. 392 ..... 28, 31
Forepaugh v. Delaware etc. Ry. Co., 5 L. R. A. 508 (note) 40
Forsyth's Estate, In re (1894), 32 N. Y. S. 175 30

Gilbertson v. Bullard (1904), 125 Iowa 420, 101 N. W. 108, 30
Gray v. Union Trust Co., 171 Cal. 637, 154 Pac. 309 32
Gulf & Ship Island Ry. Co. v. Hewes, 183 U. S. 66, 49 L. ed. 80 38
Gurnsey, Estate of (1918), 177 Cal. 211, 170 Pac. 402 ..... 28, 31

Haggerty, In re (1908), 112 N. Y. S. 1017 28
Haight's Estate, In re (1912), 136 N. Y. S. 557 ..... 29, 30
Heilman v. McWilliams, 70 Cal. 449, 11 Pac. 659 32
Hendersonville Light & Power Co. v. Blue Ridge I. R. Co., 243 U. S. 563, 61 L. ed. 900 40

CASE PAGE

Hobbes Land & Live Stock Co. v. Interstate Trading Co., 233 U. S. 530, 58 L. ed. 1083 (dissenting opinion of Day, J.) 30

Howe v. Howe (1901), 179 Mass. 549, 61 N. E. 225, 55 L. R. A. 620 30

Hunt v. Wicht (1917), 174 Cal. 205, 162 Pac. 939 ..... 28, 31

Lacey v. State Treasurer (1911), 151 Iowa 477, 132 N. W. 883 ..... 28, 29

Lambard, In re, 88 Me. 587, 34 Atl. 539 30

Lansing, Matter of (1895), 182 N. Y. 238, 74 N. E. 882 ..... 28, 29, 30

McLain v. Penn. Co., 108 Fed. 618 30

Meyer, In re (1903), 83 N. Y. App. Div. 381, 82 N. Y. S. 320 28

Miller, In re, 110 N. Y. 216, 18 N. E. 139 30

Morgan, In re, 119 N. Y. S. 1022 30

Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L. ed. 392 39

Nichols v. Emery, 109 Cal. 323, 41 Pac. 1089 32

Nickel v. State of California (1918), 50 Cal. Dec. 359, 175 Pac. 941 ..... 28, 31

Pell, In re (1901), 80 App. Div. 280, 70 N. Y. S. 199 27

Pell, In re (1902), 171 N. Y. 48, 63 N. E. 789 28

People v. Cogswell, 113 Cal. 129, 45 Pac. 270 32

Postal Telegraph Cable Co. v. City of Newport, 247 U. S. 464, 62 L. ed. 1215 35

Price v. Hopkins, 13 Mich. 318 31

Pullen v. Wake Co. (1872), 66 N. C. 361 28

Ripley, Matter of, 192 N. Y. 532, 84 N. E. 1120 30

Roby v. Colehour, 146 U. S. 153, 36 L. ed. 922 ..... 35, 38

Slosson's Estate, In re, 210 N. Y. 79, 110 N. E. 1007 30

Smith, In re (1912), 135 N. Y. S. 240 ..... 28, 29

Standard Oil Co. v. Graves (1918-19), No. 13 U. S. Sup. Ct. Adv. Op. 312 35

State v. Safe Deposit & Trust Co. (1918), 132 Md. 251, 103 Atl. 435 28

St. Louis, I. M. & S. R. Co. v. Starbird, 243 U. S. 592, 61 L. ed. 917 35

CASE PAGE
Vanderbilt, Matter of (1902), 172 N. Y. 69, 64 N. E. 782 . . . . . 28, 29
Warrimer v. People (1888), 6 Dem. (N. Y. Surr.) 211 30
Wartman v. Philadelphia, 33 Penn. St. 202 31
West Chicago Street Railroad Co. v. Illinois, 201 U. S. 506, 50 L. ed. 845 35

INDEX OF STATUTES CITED

PAGE
Civil Code of California, Sec. 2280 32
Inheritance Tax Act of Nevada (Stats. of Nevada, 1913, p. 411) 25

In the Supreme Court

OF THE

United States

October Term, 1919.

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees, etc., et al.,
Petitioners,

vs.

GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent.

NELLIE MILLER NICKEL and J. LEROY NICKEL, as Trustees, etc.,
Petitioners,

vs.

STATE OF NEVADA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts in these cases are not in dispute. The cases involve an attempt to impose on certain property a transfer or inheritance tax under an act of the State of Nevada (Stats. of Nevada, 1913, p. 411), which act was not in effect at the time that the property was transferred. The property was transferred by a deed of trust, and the court found that it was made, executed and delivered on the day it bore date, and on

the same date the grantor endorsed, assigned, transferred and delivered the property in question, namely, certain shares of capital stock, to the grantees; that on the same date the trustees accepted the trust in writing; that on the same date the said stock was transferred on the books of the corporation to the trustees, and the deed of trust and stock were kept in the exclusive custody of the trustees. The act in question taxed two characters of transfers, namely, transfers made in contemplation of death, and transfers intended to take effect in possession or enjoyment at or after death. It is not disputed that the transfer was of the character mentioned by the act, and would have been subject to taxation if the act had been in force, but it is claimed that the act, not being in force, the transfer can not constitutionally be subject to the tax in question. The Supreme Court, in its decision, admits that the act was not in force; that it had no language in it expressly making it retroactive so as to cover transfers theretofore made; that it had no language in it which could be construed as making it retroactive or applicable to transfers already made, but nevertheless held the transfer subject to the imposition of the tax. The result, therefore, is the same as if the act had expressly attempted to reach back and tax a past transfer, or if the court had construed the act so as to make it reach back and tax a past transfer. In other words, the privileges and immunities of the Constitution relied upon have been denied by the state court. The petitioners in the state court expressly claimed that if this property were impressed with this tax, they would

be deprived of the constitutional rights, privileges and immunities set up by them; the tax having been so imposed upon the property, these rights, privileges and immunities were necessarily denied.

In this brief we shall not burden the court with a detailed argument, but shall briefly state the points and authorities showing that the rights, privileges and immunities under the Constitution claimed by the petitioners were denied, and that they were improperly denied by the state court.

I.

To impose a transfer or inheritance tax upon a transfer made before the act imposing the tax became effective, deprives the owners of the estates created by such transfer of their property without due process of law, and takes their property for a public use without just compensation, and deprives them of the equal protection of the law, in violation of the fourteenth amendment to the Constitution of the United States, and impairs the obligation of contracts, in violation of section 10, article I, of the Constitution of the United States, and this is true, although the transfer may have been made in contemplation of death, or intended to take effect in possession or enjoyment at or after death. If the estate transferred vests *in interest* before the act becomes effective, the act can not apply, although the estate vests *in possession or enjoyment* thereafter.

NEW YORK:

In re Pell (1901), 60 App. Div. 286, 70 N. Y. S. 150;

In re Pell (1902), 171 N. Y. 48, 63 N. E. 789;
Matter of Lansing (1905), 182 N. Y. 238, 74 N. E. 882;
Matter of Vanderbilt (1902), 172 N. Y. 69, 64 N. E. 782;
In re Meyer (1903), 83 N. Y. App. Div. 381, 82 N. Y. S. 329;
In re Smith (1912), 135 N. Y. S. 240;
Matter of Craig (1904), 97 App. Div. 289, 89 N. Y. S. 971;
Matter of Chapman (1909), 117 N. Y. S. 679;
In re Haggerty (1908), 112 N. Y. S. 1017.

NORTH CAROLINA:

Pullen v. *Wake Co.* (1872), 66 N. C. 361.

VIRGINIA:

Com. v. *Wellford* (1913), 114 Va. 372, 76 S. E. 917.

IOWA:

Lacey v. *State Treasurer* (1911), 152 Ia. 477, 132 N. W. 883.

CALIFORNIA:

Hunt v. *Wicht* (1917), 174 Cal. 205, 162 Pac. 639;
Estate of Felton (1917), 176 Cal. 663, 169 Pac. 392;
Estate of Gurnsey (1918), 177 Cal. 211, 170 Pac. 402;
Nickel v. *State of Cal.* (1918), 56 Cal. Dec. 359, 175 Pac. 641.

MARYLAND:

State v. *Safe Deposit & Trust Co.* (1918), 132 Md. 251, 103 Atl. 435.

deed and operated as such, and this contention was expressly withdrawn in the decision on rehearing.

In the original decision, the court seemed to hold that the act had some effect upon the transfer because of the fact that it was passed, although, according to its express terms, was not in effect at the time of the deed, but on rehearing this contention was shown to be unfounded (see cases cited in points VI and VIII of brief), and this point was not relied upon on the final decision on rehearing.

In the original decision the court seemed to place some importance on the fact that certain of the estates created by the deed were future, contingent, or defeasible estates, but on rehearing this was shown to be immaterial, so far as the constitutional question involved was concerned (see cases cited in point II of brief), and in the final decision on rehearing this matter is not further relied upon.

In the final decision on rehearing, the court relies only upon the proposition that

> "it is the vesting of the property *in possession and enjoyment* of the same upon the death of the grantor, and after the statute took effect, that renders it liable to the tax."

In opposition to this, we claim that in all the cases where it has been held that an act attempting to tax a transfer retroactively is unconstitutional, it was so held, notwithstanding the fact that possession and enjoyment, according to the terms of the transfer, vested upon the death of the grantor and after the statute took effect. In other words, the controlling fact is the

vesting *in interest* and not the vesting *in possession and enjoyment.* (See cases cited in point V of brief.)

In the original decision the Supreme Court said:

> "The questions to be determined are narrowed down to three propositions: Did the deed of trust create a vested estate? Does the act apply to transfers made before it became effective? Can the act constitutionally be made to apply to such a transfer? Reading the opinion of the trial court in connection with its findings and conclusions, we take it that the last question is eliminated from the case. The district court in its opinion states:
>
> 'It will be noted that the statute went into effect April 25, 1913, and is not by its express terms made retroactive. Hence, it must be construed as having only a prospective operation, as no intent to make the same operate retrospectively may be inferred from the words therein employed; therefore, if the interests in the property mentioned in the deed passed to and vested absolutely in the beneficiaries therein named upon the date of the execution and delivery of the deed and independently of the death of Henry Miller, no tax levy may lawfully be imposed thereon.'
>
> "In this situation the vital point raised is, did the deed of trust as of its date create a vested estate so as to exempt the transfer from the operation of the statute?"

It would seem from this language that the court held:

First, that the act in question had no language in it expressly making it retroactive or applying to a deed which created vested estates prior to the effective date of the act.

Second, that there was nothing in it from which

II.

The mere fact that a deed executed before the date upon which an inheritance tax goes into effect creates estates which are technically contingent, and do not become vested until after the death of the grantor, and after the act becomes effective, does not change this rule.

Matter of Lansing (1905), 182 N. Y. 238, 74 N. E. 882;
Matter of Vanderbilt (1902), 172 N. Y. 69, 64 N. E. 782;
Lacey v. *State Treasurer* (1911), 152 Ia. 477, 132 N. W. 883;
In re Smith (1912), 135 N. Y. Suppl. 240;
Matter of Craig (1904), 89 N. Y. Suppl. 971, 97 App. Div. 289.

III.

Even if the deed contains a power of revocation, but that power is not in fact exercised, the same rule applies.

Commonwealth v. *McCauley's Executor* (1915), 166 Ky. 450, 179 S. W. 411;
In re Haight's Estate (1912), 136 N. Y. Suppl. 557.

IV.

Even if the deed contains a provision giving or reserving a power of revocation by which the grantor could destroy the grant and appoint the property to someone else, but the power of appointment is not in

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fact exercised and the property and the estates pass under the deed, the rule is the same.

In re Haight's Estate (1912), 136 N. Y. Suppl. 557;
Matter of Lansing (1905), 182 N. Y. 238, 74 N. E. 882;
Matter of Ripley, 192 N. Y. 536, 84 N. E. 1120;
In re Slosson's Estate, 216 N. Y. 79, 110 N. E. 1067;
Matter of Chapman (1909), 117 N. Y. Suppl. 679;
In re Morgan, 140 N. Y. Suppl. 1022.

V.

This rule does not depend upon when the estates vest *in possession or enjoyment*, but when they vest *in interest*, nor is it in any way affected by the motive of the transfer, or the fact that it was made in contemplation of death.

Howe v. *Howe* (1901), 179 Mass. 546, 61 N. E. 225, 55 L. R. A. 626;
Carter v. *Whitcomb* (1908), 74 N. Y. 482, 69 Atl. 779;
Eury's Executors v. *State* (1905), 72 Ohio St. 448, 74 N. E. 650;
In re Forsyth's Estate (1894), 32 N. Y. Suppl. 175;
Gilbertson v. *Bullard* (1904), 125 Iowa 420, 101 N. W. 108;
Warriner v. *People* (1888), 6 Dem. (N. Y. Surr.) 211;
In re Miller, 110 N. Y. 216, 18 N. E. 139;
In re Lambard, 88 Me. 587, 34 Atl. 530;
Commonwealth v. *Wellford* (1913), 114 Va. 372, 76 S. E. 917;
McLain v. *Penn. Co.*, 108 Fed. 618.

VI.

This same rule applies where the transfer was made between the date of the passage of the act and the date upon which it goes into effect.

Hunt v. *Wicht* (1917), 174 Cal. 205, 162 Pac. 639;
Estate of Felton (1917), 176 Cal. 663, 169 Pac. 392;
Estate of Gurnsey (1918), 177 Cal. 211, 170 Pac. 402.

VII.

This same rule has been applied by the Supreme Court of California, where the deed was made, where the parties reside, and where the property was in fact located, with respect to this same transfer.

Nickel v. *State of California* (1918), 56 Cal. Dec. 359, 175 Pac. 631.

In that case there was a transfer or inheritance tax act in California at the date of this transfer in 1913—namely, the Act of 1911. Two acts were subsequently passed and before the death of the grantor. The lower court imposed a tax under those later acts, but the Supreme Court held, under the authority of *Hunt* v. *Wicht, supra,* that that could not be done, but that the transfer must be governed by the law of 1911, which was in force at the time of the transfer.

VIII.

An act passed, but not in effect at the date of a transfer in no way affects such transfer.

Wartman v. *Philadelphia,* 33 Penn. St. 202;
Price v. *Hopkins,* 13 Mich. 318;

Denert v. *Purdy*, 29 Penn. St. 113;
Burn v. *Carvallo*, 1 A. & E. 883, 28 E. C. H. 408, 4 N. & M. 889, 30 E. C. L. 622.

IX.

The deed in question was not subject to revocation.

Gray v. *Union Trust Co.*, 171 Cal. 637, 154 Pac. 306;
Hellman v. *McWilliams*, 70 Cal. 449, 11 Pac. 659;
Nichols v. *Emery*, 109 Cal. 323, 41 Pac. 1089;
People v. *Cogswell*, 113 Cal. 129, 45 Pac. 270;
Booth v. *Oakland Bank of Savings*, 122 Cal. 19, 54 Pac. 370;
Copp v. *Gunther*, 95 Cal. 63, 30 Pac. 301;
Civil Code of California, sec. 2280.*

X.

The instrument is not testamentary in character. The instrument was called a deed of trust, and had formal party of the first part and parties of the second part, and for a recited consideration purported to presently

> "grant, bargain, sell, transfer, convey and set over unto the said parties of the second part,"

the property in question upon certain trusts therein set forth. That the trust immediately took effect is obvious, because the deed of trust provided that the trustees should receive the rents, issues and profits of the property during the lifetime of the grantor, and should pay the same to the grantor during his life.

*"Sec. 2280. A trust can not be revoked by the trustor after its acceptance, actual or presumed by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued."

The instrument then proceeded to provide the further trusts upon which the property should be held after the death of the grantor. By paragraph III, the trustees were given the unrestrained power of sale of the property. By paragraph IV the trustees were given the power to appoint additional trustees, and the deed was executed and acknowledged as a deed of trust, and was immediately delivered as such. That the instrument was intended to have immediate operation is conclusively shown by the fact that the property covered by it was immediately endorsed, assigned and actually transferred and delivered to the grantees, and they accepted the trust and immediately entered upon the discharge of their duties as such trustees. Title to the shares of stock could have been transferred to the trustees without any deed of trust whatever, merely by endorsing and delivering them. The deed simply evidenced that transfer and declared the trusts upon which the transfer was made.

But this whole discussion as to this deed of trust not being in fact a deed of trust, but being merely testamentary in character, is contrary to the pleadings and findings in the case. By the petition of the State Controller herein it is alleged:

> "That on or about the 17th day of April, 1913, the deceased, Henry Miller, made, executed and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, as trustees" (fols. 17-18),

and this deed of trust is set forth as an exhibit to the petition (fols. 100 *et seq.*). While it was alleged in the petition that the deed was made in contemplation

of death, and was intended to take effect "in possession or enjoyment" after death, there was no suggestion made that the deed of trust was not in fact a deed of trust, or was not made, executed and delivered at its date, or did not presently pass title to the property therein described. The findings are:

> "That on April 17, 1913, Henry Miller, deceased, made, executed and delivered that certain deed of trust, dated April 17, 1913, and recorded in Book 972 of Deeds (N. S.), page 170, of the county recorder's office of the City and County of San Francisco, a copy of said deed of trust is annexed to the petition in this action. That Nellie Miller Nickel and J. Leroy Nickel were designated as trustees on the same day, to-wit: April 17, 1913, accepted the said trust, by an endorsement in writing thereon, duly signed and acknowledged by them, which is likewise made a part of the petition herein. . . . That said trust deed was recorded in the City and County of San Francisco, October 20, 1916. That said deed of trust was never recorded or placed of record in the State of Nevada, or any of the counties thereof. That prior to October 20, 1916, said deed of trust had been kept in a safety deposit box, to which the trustees, J. Leroy Nickel and Nellie Miller Nickel, had exclusive access. That in the same safety deposit box there was deposited on or about April 17, 1913, certificates of stock of Miller & Lux Incorporated, which said certificates of stock were endorsed, assigned, transferred and delivered by the said Henry Miller to said trustees on the same day as the execution of said deed of trust." (Fols. 1761-5.)

The judgment in case numbered 2309 adjudged that the trustees *under the deed* are the owners of the stock as follows:

"And it is further ordered, adjudged and decreed that subject to the said lien, plaintiffs [being the trustees under the deed] are the owners of 119,871.75 shares of stock, and their title thereto subject to said lien, is hereby quieted against defendant." (Transcript, p. 47.)

XI.

Where a party claims that to impose a certain burden would deprive him of rights, privileges or immunities secured by the Federal Constitution, a state court can not prevent a review by failing to pass upon the validity of that claim of right or immunity under the Constitution. In such a case as this, the case can not be decided without passing upon the validity of the right, privilege or immunity invoked under the Federal Constitution, and in such a case the decision can be reviewed whether or not the Federal question was passed upon by the state court.

Chicago, B. & Q. Ry. v. *Illinois*, 200 U. S. 561, 50 L. ed. 596;
West Chicago Street Railroad Co. v. *Illinois*, 201 U. S. 506, 50 L. ed. 845;
Roby v. *Colehour*, 146 U. S. 153, 36 L. ed. 922;
St. Louis, I. M. & S. R. Co. v. *Starbird*, 243 U. S. 592, 61 L. ed. 917;
Corn Products Refining Co. v. *Eddy*, No. 13, U. S. Sup. Court Adv. Op. 398 (1918-19);
Standard Oil Co. v. *Graves*, No. 13 U. S. Sup. Ct. Adv. Op. 412 (1918-19);
Postal Telegraph-Cable Co. v. *City of Newport*, 247 U. S. 464, 62 L. ed. 1215;
Citizens Bank of Los Angeles v. *Parker*, 192 U. S. 73, 48 L. ed. 346;
Atty. General of Michigan v. *Lowrey*, 199 U. S. 233, 50 L. ed. 167.

See, also, cases reviewed in dissenting opinion of Day, J., in *Holden Land & L. S. Co.* v. *Interstate Trading Co.*, 233 U. S. 536, 58 L. ed. 1083.

The above decisions are not by any means exhaustive of this subject, and merely indicate this line of authority. The following excerpts from the opinions of this court in these cases sufficiently indicate the rule:

> "Undoubtedly, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the state court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law. * * * Therefore, a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim

of a Federal right would have become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right."—Harlan, J., in *Chicago, B. & Q. Ry.* v. *Illinois, supra.*

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the state court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city can not, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving anyone of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error, for the Federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument. Our views on this question are fully stated in *Chicago, B. & Q. Ry.* v. *Illinois* (recently decided), 200 U. S. 561, 50 L. ed. 596."—Harlan, J., in *West Chicago Street Ry. Co.* v. *Illinois, supra.*

"The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but

solely with the effect and operation of the law as put in force by the state." (Citing numerous decisions.)—Pitney, J., in *Corn Products Refining Co.* v. *Eddy*, *supra*.

"While this court follows the decisions of the highest court of a state, as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void." (Citing cases.)—Day, J., in *Standard Oil Co.* v. *Graves*, *supra*.

XII.

The certificate of the Chief Justice of the Supreme Court of Nevada that a Federal question was involved and decided, is entitled to considerable weight, particularly where the opinions of the state court in the cases are conflicting and far from clear.

Roby v. *Colehour*, 146 U. S. 153, 36 L. ed. 922;
Gulf & Ship Island Ry. Co. v. *Hewes*, 183 U. S. 66, 46 L. ed. 80;
Caperton v. *Bowyer*, 14 Wall. 216, 20 L. ed. 882.

XIII.

The points suggested in the first decision in support of the position that no vested right was created by the deed, namely, the claim that the deed was testamentary; that it was revocable; that the estates created were contingent, future and defeasible, or that the act had some effect, because it was passed, but not in effect, are not as to local matters which will avoid a review, but are merely colorable and without any substantial foundation.

(See cases cited under points I to X, *supra*.)

XIV.

It is only where a decision on a local matter proceeds entirely irrespective of the Federal question that a review is prevented in this court; as, for instance, where it is held that the right asserted has been lost by limitation, barred by laches or is *res judicata*. Here there was no question in the cases, except the Federal question, namely, whether the act could constitutionally be made applicable to this transaction, and to the estates and property rights created thereby.

(See cases cited under point XI, *supra*.)

XV.

In determining the validity of an act of the state, the question is its constitutionality as it has been construed and enforced by the state court. The court having enforced the act with respect to this transaction, which took place before the act became effective, can not avoid a decision on its constitutionality by the language of the decision construing it as not being applicable to transactions taking place prior to its going into effect.

Myles Salt Co. v. Board of Commissioners, 239 U. S. 478, 60 L. ed. 392.

XVI.

The chief justice of the state court having dissented from the decision on the ground that the act could not constitutionally be made applicable to the transfer

because made before the act became effective, is cogent evidence that a Federal question was involved.

Hendersonville Light & Power Co. v. *Blue Ridge I. R. Co.*, 243 U. S. 563, 61 L. ed. 900.

XVII.

Since the Federal courts have final jurisdiction to determine whether a person has been deprived of property without due process of law, they can not be deprived of that power by a decision that a conditional estate or a defeasible estate is not property or a vested right. That is a matter of general law not binding upon the Federal court.

See note to *Forepaugh* v. *Delaware etc. R. Co.*, 5 L. R. A. 508.

Respectfully submitted.

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In the Supreme Court
OF THE
United States

_____ TERM, 1920

J. LEROY NICKEL and NELLIE MILLER NICKEL, Trustees, etc., et al.,
Petitioners,
vs.
GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent.

7[redacted]268

NELLIE MILLER NICKEL and J. LEROY NICKEL, Trustees, etc.,
Petitioners.
vs.
STATE OF NEVADA,
Respondent.

7[redacted]269

OBJECTIONS TO ISSUANCE OF WRIT OF CERTIORARI, AND ARGUMENT THEREON.

LEONARD B. FOWLER,
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In the Supreme Court

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..... TERM, 1920

NELLIE MILLER NICKEL and J. LEROY NICKEL, Trustees, etc.,
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vs.
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Petitioners,
vs.
GEORGE A. COLE, as State Controller of the State of Nevada,
Respondent.

OBJECTIONS TO ISSUANCE OF WRIT OF CERTIORARI.

Come now GEORGE A. COLE, as State Controller of the State of Nevada, respondent, and STATE OF NEVADA, respondent, and object to the issuance of writ of certiorari herein upon the following grounds, to wit:

I.

That this court has no jurisdiction to issue a writ of certiorari herein.

II.

That a writ of certiorari is not the remedy provided for by law in a case presenting the situation that exists in the two cases herein.

ARGUMENT.

The court is without jurisdiction to issue a writ of certiorari herein. Paragraph III of the Petition is as follows:

> "The first of said cases is a statutory proceeding brought by the State Controller of the State of Nevada for the purpose of collecting a transfer or inheritance tax claimed by the State of Nevada under an act of the State of Nevada, approved March 26, 1913, but which, by the express terms of the act, did not go into effect until April 25, 1913, upon a transfer made by one Henry Miller to the petitioners on April 17th, 1913, and before the effective date of the act in question.
>
> The second case is a statutory suit to quiet title, brought by the petitioners, as trustees under said deed, against the claim for such transfer or inheritance tax made by the State of Nevada."

This language correctly states the legal situation. The authority of the State of Nevada to do certain things pursuant to a statutory enactment of the legislature of the State of Nevada is the subject of dispute in both cases. The Supreme Court of the State of Nevada has affirmed this authority. The decision must, therefore, be reviewed, if at all, upon a writ of error. In the case of Ireland vs. Woods, 246 U. S. Reports, 323, this court, on page 327 thereof, after

referring to Section 237 of the judicial code, as amended September 6th, 1916, C. 448, 39 Stat. 726, gives the language of said section, which is as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

This court then proceeds to say:

> "When, however, the conditions are reverse, that is, when state court judgments affirm the national powers against a contention of their invalidity or do not sustain the validity of the state authority against an attack based on federal grounds, there can be review only by certiorari. And the same manner of review is prescribed where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is either in favor of or against the claim set up."

From the case of New Orleans & Northeastern Railroad Company et al. v. Scarlet, 249 U. S. Reports,

page 528, we desire to quote on page 530 thereof, as follows:

> "The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the valadity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied."

In the case of Dana v. Dana et al., 39 Supreme Court Reporter, page 449, this court, on page 450, gives expression as to the law relative to a writ of certiorari. The language is as follows:

> "An examination of the record in the case and the opinion of the Supreme Judicial Court, shows that neither the validity of the statute, nor the validity of any authority exercised under the state was drawn in question. The case was decided on the view which the Supreme Judicial Court entertained of the character of the property involved, and neither in the record nor in the opinion of the court does it appear that any question was raised or decided which involved the valadity of the statute of the state, or of an authority exercised under the state, on the ground of their repugnancy to the Constitution, treaties, or laws of the United States. It follows that the only right of review in this court of the decree of the Supreme Judicial Court of Massachusetts was by writ of certiorari. It is only necessary to refer to our decisions construing the amendment of September 6, 1916. Philadelphia & Reading Coal & Iron Co. v. Gilbert, 245, U. S. 162, 38 Sup. Ct. 58, 62 L. Ed. 221; Ireland v. Woods, 246 U. S. 323, 38 Sup. Ct. 319, 62 L. Ed. 745; Stadleman v.

Miner, 246 U. S. 544, 38 Sup. Ct. 359, 62 L. Ed 875; Northern Pacific Railway Co. v. Solum, 247 U. S. 477, 481, 38 Sup. Ct. 550, 62 L. Ed. 1221."

In the case of Stadleman v. Miner, 62 Law. Ed. page 875, this court, on page 876, refers to the statute which provides that a writ of error is the remedy in a case where there is drawn in question the valadity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their valadity.

We sumbit that a writ of certiorari should not issue herein.

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WM. C. PRENTISS,
Attorneys for Respondents.

MAR 17 1921
JAMES D. MAHER,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

Numbers 268 and 269.

J. LEROY NICKEL AND NELLIE MILLER NICKEL, TRUSTEES, UNDER THE LAST WILL AND TESTAMENT OF HENRY MILLER, DECEASED, AND J. LEROY NICKEL AND NELLIE MILLER NICKEL, TRUSTEES, UNDER A CERTAIN DEED OF TRUST, DATED APRIL 17, 1913, ETC., ET AL., PLAINTIFFS IN ERROR AND PETITIONERS,

vs.

GEORGE A. COLE, AS STATE COMPTROLLER OF THE STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

NELLIE MILLER NICKEL AND J. LEROY NICKEL, AS TRUSTEES UNDER THAT CERTAIN DEED OF TRUST DATED APRIL 17, 1913, MADE, EXECUTED, AND DELIVERED BY HENRY MILLER TO NELLIE MILLER NICKEL AND J. LEROY NICKEL, AS TRUSTEES, ETC., PLAINTIFFS IN ERROR AND PETITIONERS,

vs.

STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

BRIEF FOR PLAINTIFFS IN ERROR AND PETITIONERS.

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Attorneys for Plaintiffs in Error and Petitioners.

SUBJECT INDEX.

Note.—We recognize that the record in these cases is long, but the facts are not in dispute and the relevant facts are within a small compass. This brief is also too long, due partly to the fact that we deemed it necessary to review the many cases cited by counsel for defendants in error, or by the State courts, which we believe in the main have no relevancy to the case. All references herein are to the side folio numbers in case No. 298, unless otherwise expressly stated.

	Page.
I. Statement of the case	1–14

Henry Miller, a resident of California, being the owner of certain shares of stock of Miller & Lux, Incorporated (a corporation incorporated under the laws of Nevada, but owning no property therein, but owning the capital stock of another corporation which did own property in Nevada), made, executed, and delivered in California a deed of trust on April 17, 1913, transferring the same to certain trustees, in trust to pay the income to the grantor during his life, and upon his death to certain designated persons during their lives, the remainder then to go to certain designated persons. The trustees on the same day accepted the trust and the shares of stock were actually on that day endorsed, assigned, and delivered to the trustees, who surrendered the same and had new shares issued in their own names.

At the time of this transaction there was no transfer tax law of the State of Nevada in force taxing such a transfer, but an act of that kind became effective thereafter and on the 25th day of April, 1913.

Henry Miller having died on the 14th day of October, 1916, the State of Nevada sought to impose a tax on this transfer under that act, which the trustees and beneficiaries resisted in the State courts on the grounds: (*a*) that the act was not intended to tax a transfer made before the act became effective, and (*b*) that if such a tax was imposed under such an act it would take their property in violation of the provisions of the Constitution of the United States relied upon by them.

Page.

The State court decided the first point in favor of the trustees and beneficiaries, but by a decision concurred in by two justices, the other justice dissenting, avoided the second point by deciding that the deed of trust was not a deed, but was testamentary in character, and that it was subject to revocation, and passed no title.

On writ of error to this court the trustees and beneficiaries claim that there is no substantial basis in law or fact for the grounds of decision by the majority of the State court by which the Federal question is thus avoided, and that as a result this burden has been imposed either by an act retroactively imposing this burden or without any law authorizing the imposition, and that in either case their property is taken in violation of the provisions of the Federal Constitution relied upon by them.

II. Assignment of errors 14-17

III. Argument 17-46

I. To impose a transfer or inheritance tax upon a transfer made before the act imposing the tax becomes effective deprives the owners of the estates created by such transfer of their property without due process of law and takes their property for a public use without just compensation and deprives them of the equal protection of the law, in violation of the fourteenth amendment to the Constitution of the United States, and impairs the obligation of contracts, in violation of Section 10, Article I of the Constitution of the United States, and this is true although the transfer may have been made in contemplation of death or intended to take effect in possession or enjoyment at or after death. If the estate transferred vests in interest before the act becomes effective the act cannot apply, although the estate vests in possession or enjoyment thereafter.

In re Pell (1902), 171 N. Y., 48; 63 N. E., 789;

Matter of Lansing (1905), 182 N. Y., 238; 74 N. E., 82;

Matter of Vanderbilt (1902), 172 N. Y., 60; 64 N. E., 782;

Page.

In re Meyer (1905), 93 N. Y. App. Div., 291; 87 N. Y. S., 329;
In re Smith (1912), 135 N. Y. S., 240;
Matter of Craig (1904), 97 App. Div., 280; 90 N. Y. S., 951;
Matter of Chapman (1909), 117 N. Y. S., 659;
In re Haggerty (1908), 112 N. Y. S., 1017;
Lacey ex. State Treasurer (1911), 152 Iowa, 477; 132 N. W., 843;
Commonwealth ex. Wellford (1913), 114 Va., 372; 76 S. E., 947;
Fuller ex. Wake County (1872), 66 N. Car., 361;
Hunt ex. Wight (1917), 174 Cal., 205; 162 Pac., 939;
Estate of Felton (1917), 176 Cal., 693; 169 Pac., 392;
Estate of Gurney (1918), 177 Cal., 211; 170 Pac., 602;
State ex. Safe Deposit & Trust Co. (1918), 132 Md., 251; 103 Atl., 435;
State ex. Probate Court (1907), 102 Minn., 208; 113 N. W., 808.

99. The transfer made by the deed of trust dated April 17, 1913, created vested rights in the beneficiaries and the remaindermen, and, no power of revocation being reserved, such rights were not subject to be defeated by any act of the grantor, and such rights vested at the date of the transfer and not at the date of the death of the grantor..... 46-56

Deed created vested rights..... 46-55

Nichols ex. Emery (1895), 109 Cal., 323; 41 Pac., 1089;
Tennant ex. Tennant Memorial Home (1914), 167 Cal., 570; 140 Pac., 242;
Gray ex. Union Trust Co. (1915), 171 Cal., 697; 171 Pac., 306.

Under the law of California the instrument in question was not subject to revocation..... 55-56

Civil Code of Cal., sec. 2280;
Heilman ex. McWilliams, 70 Cal., 449; 11 Pac., 630;

Page.

Nichols *ex.* Dimon, 169 Cal., 325; 41 Pac., 1003;
People *ex.* Orgood, 113 Cal., 139; 45 Pac., 270;
Booth *ex.* Oakland Bank of Savings, 122 Cal., 19; 54 Pac., 370;
Clegg *ex.* Gunther, 95 Cal., 63; 30 Pac., 201.

Under the general law of trusts the deed was not revocable 36
1 Perry on Trusts, 6th ed., sec. 104;
39 Cyc., 92;
Opinion of Coleman, J., pp. 649-655.

III. The act of the State of Nevada, having been passed before the transfer, but having expressly provided that it should not go into effect until a date after the transfer, has no effect on the transfer and cannot be looked to as a rule of conduct governing the parties to the transfer..... 37, 38
Estate of Felton (1917), 176 Cal., 663; 169 Pac., 362;
Hunt *ex.* Wight (1917), 174 Cal., 26; 162 Pac., 239;
Wurtzman *ex.* Philadelphia, 33 Pa. St., 202;
Price *ex.* Hopkins, 13 Mich., 318;
Bennet *ex.* Purdy, 29 Pa. St., 113;
Hunt *ex.* Carvalho, 1 A. & E., 852; 28 E. C. L., 408; 4 N. & M., 889; 30 E. C. L., 622.

IV. The decision of the Supreme Court of Nevada is contrary to the decision with respect to the same transfer by the Supreme Court of California where the parties reside and the transfer was made..... 38-61
Nickel *ex.* State of California (1918), 179 Cal., 126; 175 Pac., 661;
Estate of Miller (Cal.), decided January 18, 1921.

V. This court is not barred from protecting litigants with respect to constitutional rights invoked by them by reason of any failure of the State court to expressly pass on the constitutional question, and when the decision of the State Court is attempted to be placed on non-Federal grounds, this court may itself determine whether there is any fair and substantial support for the non-Federal grounds put forward, and if they are plainly untenable may

Page.

disregard them and deem the constitutional right denied in substance and effect..... 65 67

Union Pacific R. R. Co. *vs.* Public Service Com., 248 U. S., 67;

Leathe *vs.* Thomas, 207 U. S., 93, 99;

Vandalia R. R. Co. *vs.* South Bend, 207 U. S., 359, 367;

Gaar, Scott & Co. *vs.* Shannon, 223 U. S., 468;

Creswill *vs.* Knights of Pythias, 225 U. S., 246, 261;

Enterprise Irrigation District *vs.* Farmers Mutual Canal Co., 243 U. S., 157, 164;

Jefferson Branch Bank *vs.* Skelly, 1 Black, 436, 443;

Huntington *vs.* Attrill, 146 U. S., 657, 683-4;

Boyd *vs.* Thayer, 143 U. S., 135, 160;

Carter *vs.* Texas, 177 U. S., 442, 447;

Terre Haute & Indianapolis R. R. Co. *vs.* Indiana, 194 U. S., 579, 589;

Ward *vs.* Love County, 253 U. S., —; decided April 25, 1920;

Chicago, R. & Q. Ry. *vs.* Illinois, 200 U. S., 561; 50 L. Ed., 596;

West Chicago Street Railroad Co. *vs.* Illinois, 201 U. S., 506; 50 L. Ed., 845;

Roby *vs.* Colehour, 146 U. S., 153; 36 L. Ed., 922;

St. Louis, I. M. & S. R. Co. *vs.* Starbird, 243 U. S., 592; 61 L. Ed., 917;

Corn Products Refining Co. *vs.* Eddy, No. 13, U. S. Sup. Ct. Adv. Op., 298 (1918-19);

Standard Oil Co. *vs.* Graves, No. 13, U. S. Sup. Ct. Adv. Op., 412 (1918-19);

Postal Telegraph-Cable Co. *vs.* City of Newport, 247 U. S., 464; 62 L. Ed., 1215;

Citizens Bank of Los Angeles *vs.* Parker, 192 U. S., 73; 48 L. Ed., 346;

Atty. General of Michigan *vs.* Lowrey, 199 U. S., 233; 50 L. Ed., 167;

Myles Salt Co. *vs.* Board of Commissioners, 239 U. S., 478; 60 L. Ed., 392.

The matters passed upon by the Supreme Court of Nevada are all matters of general jurisprudence and

Page.

not matters of local law, and this court is not bound thereby 65-66

See note to Faugpaugh *vs.* Delaware, etc., Co., 5 L. R. A., 508.

In determining the jurisdiction of this court on writ of error the court is not concerned with the act as it is written, or even with the act as it is expressly construed, but it is concerned only with the act as it is enforced and applied by the State courts..... 66

Myles Salt Co. *vs.* Board of Commissioners, 239 U. S., 478; 60 L. Ed., 392;

Jett Bros. Distilling Co. *vs.* Carollton. — U. S., —; decided March 1, 1920.

It is immaterial whether plaintiffs in error have been deprived of their property by a law which has been given a retroactive operation, or have been deprived of their property without any authority of law..... 66-67

Cooley on Constitutional Limitations, 7th Ed., p. 507.

VI. This case is not governed by decisions applicable to estates created by the exercise of powers of appointment created before but exercised after the passage of the Inheritance Tax Act..... 67-68

VII. It is unnecessary to consider how far the legislature might impose a tax upon the coming into possession of an estate created before the passage of the act, because the act in question admittedly imposes no such a tax. It imposed a tax on the "transfer" and not on the coming into possession of the property..... 68-81

VIII. Review of opinion of the trial judge..... 81-96

IX. Review of cases relied upon by defendants in error and respondents on constitutionality of statutes taxing past transfers..... 96-107

X. Review of first decision of the supreme court of Nevada 107-133

XI. Review of second decision of supreme court of Nevada 134-147

Table of Cases Cited.

Page.

Arnaud *vs.* Executors (1832), 3 La., 336..... 19
Attorney General *vs.* Lord Middleton, 3 Hurl. & N., 125..... 70
Attorney General *vs.* Lowrey, 199 M., 233..... 63
Attorney General *vs.* Stone, 95 N. E., 395..... 84
Babb *vs.* Harrison, 70 Am. Dec., 204..... 114, 117
Barbey's Estate, In re, 114 N. Y. S., 725..... 97
Booth *vs.* Oakland Bank of Savings, 122 Cal., 19; 54 Pac., 370. 55
Bostwick, Matter of, 160 N. Y., 469..... 85
Boyd *vs.* Thayer, 143 U. S., 135, 180..... 62
Brandreth, Matter of, 169 N. Y., 437..... 83
Brushaber *vs.* Illinois Pac. R. R. Co. (1916), 240 U. S., 1..... 44
Burn *vs.* Carvallo, 1 A. & E., 823; 28 E. C. L., 408; 4 N. & M., 889; 30 E. C. L., 622..... 58
Carpenter *vs.* Commonwealth, 17 How., 456..... 71
Carter *vs.* Bugbee (1919), 92 N. J. L., 390; 106 Atl., 413..... 74
Carter *vs.* Texas, 177 U. S., 442, 447..... 62
Carter *vs.* Whitcomb (1908), 74 N. H., 482; 69 Atl., 779..... 18, 40
Chanler *vs.* Kelsey, 205 U. S., 466..... 68
Chapman, Matter of (1909), 117 N. Y. S., 679..... 26, 40
Chicago, B. & Q. Ry. *vs.* Illinois, 200 U. S., 561; 50 L. Ed., 596. 62
Citizens Bank *vs.* Parker, 192 U. S., 73..... 63
City of Grand Rapids *vs.* Lake Shore, etc., Ry. Co., 89 N. W., 932..... 43
Collateral Inheritance Tax, In re (1896), 88 Me., 587; 34 Atl., 530..... 19
Commonwealth *vs.* McCauley's Executor (1915), 166 Ky., 450; 179 S. W., 411..... 18, 40
Commonwealth *vs.* Smith, 5 Pa. St., 143..... 101
Commonwealth *vs.* Wellford (1913), 114 Va., 372; 76 S. E., 917..... 19, 28, 41
Conwell's Estate, 5 Pa. Co. Ct., 368..... 100
Cook *vs.* Cockins, 117 Cal., 140..... 44
Copp *vs.* Gunther, 95 Cal., 63; 30 Pac., 301..... 55
Cornell's Estate, 69 N. E., 445 (N. Y.)..... 83
Corn Products Refining Co. *vs.* Eddy, No. 13, U. S. Sup. Ct. Adv. Op., 398 (1918-'19)..... 62
Craig, Matter of (1904), 89 App. Div., 289; 89 N. Y. S., 971..... 24, 39, 88
Creswill *vs.* Knights of Pythias, 225 U. S., 246, 261..... 62
Crocker *vs.* Shaw, 174 Mass., 266..... 68, 144
Cruger, In re, 66 N. Y. S., 636..... 83

Page.

Delano, Matter of, 176 N. Y., 486 22
Denert *vs.* Purdy, 29 Pa. St., 113 58
Dewey *vs.* Des Moines, 173 U. S., 193; 43 L. Ed., 665 43
Dobson, In re, 132 N. Y. S., 472 99
Douglas County, In re, 84 Neb., 506; 121 N. W., 503 98
Emmons *vs.* Shaw, 50 N. E., 1023 87
Enterprise Irrigation District *vs.* Farmers Mutual Canal Co., 243 U. S., 157, 164 62
Equitable Trust Co. *vs.* Kelsey, 95 N. E., 851 86
Eury's Executors *vs.* State (1905), 72 Oh. St., 448; 74 N. E., 650 ..... 18, 40
Fangmugh *vs.* Delaware, etc., Co., 5 L. R. A., 508 62
Felton, Estate of (1917), 176 Cal., 693; 169 Pac., 392 ..... 35, 41, 57
First National Bank *vs.* Covington, 103 Fed., 523 ....
Forsyth's Estate, In re (1904), 32 N. Y. S., 175 ..... 18, 40
Gannon *vs.* McIntyre, 169 N. Y., 476 86
Garr, Scott & Co. *vs.* Shannon, 223 U. S., 468 62
Gilbertson *vs.* Ballard (1904), 125 Iowa, 420; 101 N. W., 108 .. 19, 40
Gray *vs.* Union Trust Co. (1915), 171 Cal., 637; 154 Pac., 306 ..... 52, 113, 122
Green's Estate, In re, 149 N. Y., 49; 41 N. E., 401 145
Green, Matter of, 47 N. Y., 292 81
Gurnsey, Estate of (1918), 177 Cal., 211; 170 Pac., 402 37
Haggerty, In re (1908), 112 N. Y. S., 1017 36
Haight's Estate, In re (1912), 136 N. Y. S., 577 ..... 18, 40
Haley's Estate, 152 N. Y. S., 732 18
Hart's Estate, In re, 162 N. Y. S., 716; 97 Misc., 515 99
Hellman *vs.* McWilliams, 70 Cal., 449; 11 Pac., 659 55
Hendrick's Estate, In re (1888), 3 N. Y. S., 281 18
Hite, Estate of, 159 Cal., 392 81
Hoge's Estate, In re, 215 N. Y., 447; 109 N. E., 559 18
Holden Land, etc., Co. *vs.* Interstate Trading Co., 233 U. S., 596 63
Howe *vs.* Howe (1901), 179 Mass., 546; 61 N. E., 225 ..... 18, 40
Hoyt's Estate, Re, 149 N. Y. S., 91 85
Hunt *vs.* Wicht (1917), 174 Cal., 205; 162 Pac., 639 ..... 29, 41, 57, 106, 128, 137
Huntington *vs.* Attrill, 146 U. S., 657, 683, 684 62
Jefferson Branch Bank *vs.* Skelly, 1 Black, 436, 443 62
Jett Bros. Distilling Co. *vs.* Carollton, — U. S., —, decided March 1, 1920 66
Jones, Re, 120 N. Y. S., 862 100

Page.

Keeney, In re, 194 N. Y., 281 ..... 18, 84
Keeney *vs.* New York, 222 U. S., 525; 56 L. Ed., 299 ..... 42, 79, 133
Knowlton *vs.* Moore, 178 U. S., 78; 44 L. Ed., 984 ..... 42, 133
Lacey *vs.* State Treasurer (1911), 152 Iowa, 477; 132 N. W., 883 ..... 18, 26, 39
Lambard, In re, 88 Me., 505; 34 Atl., 390 ..... 19, 41
Lamb's Estate *vs.* Morrow, 117 N. W., 1118 (Ill.) 85
Lansing, Matter of (1905), 182 N. Y., 238; 74 N. E., 82 ..... 21, 39, 40
Leathe *vs.* Thomas, 207 U. S., 93, 99 62
Line's Estate, Re, 155 Pa. St., 378; 26 Atl., 728 100
Locke *vs.* New Orleans (1867), 71 U. S., 172 44
Maris' Estate, In re, 14 Pa. Co. Ct., 171; 3 Pa. Dist. R., 38 98
Masury's Estate, In re, 28 App. Div., 380; 51 N. Y. *S.*, 331 96
McClain *vs.* Penn Co., 108 Fed., 618 ..... 18, 41, 133
Meyer, In re (1903), 83 N. Y. App. Div., 381; 82 N. Y. S., 329 23
Miller, Estate of (Cal.), decided January 18, 1921 60
Miller, In re, 140 N. Y., 223; 18 N. E., 139 ..... 19, 41
Miller *vs.* McLaughlin (1905), 141 Mich., 425; 104 N. W., 777 19
Minot *vs.* Stevens (Mass.), 93 N. E., 973 101
Minot *vs.* Winthrop, 162 Mass., 113 86
Moffitt *vs.* Kelly, 218 U. S., 400 ..... 75, 85
Mogg *vs.* Hall, 47 N. W. (Mich.), 553 43
Moir's Estate, In re, 69 N. E. (Ill.), 905 83
Morgan, In re, 149 N. Y. S., 1022 40
Morrow *vs.* Depper, 153 Iowa, 341; 133 N. W., 729 18
Myers Salt Co. *vs.* Board of Commissioners, 239 U. S., 478; 60 L. Ed., 392 ..... 43, 63, 66
New England Trust Co. *vs.* Abbott, 205 Mass., 279 82
New York *vs.* Reardon, 204 U. S., 152; 51 L. Ed., 415 42
Nickel *vs.* State of California (1918), 179 Cal., 126; 175 Pac., 641 ..... 58, 139
Nichols *vs.* Emery (1895), 109 Cal., 323; 41 Pac., 1089 ..... 47, 55, 131
Nonnemacher *vs.* Smith, 129 Wis., 190; 108 N. W., 627 101
Ogsbury's Estate, In re, 39 N. Y. S., 978 97
Orr *vs.* Gilman, 183 U. S., 278 68
Oyon, Succession of (1844), 6 Rob. (La.), 504 19
Patterson's Estate, In re, 127 N. Y. S., 284 97
Pell, In re (1902), 171 N. Y., 48; 63 N. E., 780 ..... 19, 88, 146
People *vs.* Carpenter (Ill.), 106 N. E., 302 106
People *vs.* Cogswell, 113 Cal., 129 55
People *vs.* Kelley, 75 N. E., 1038 (Ill.) 84
People *vs.* Moir, 207 Ill., 108; 69 N. E., 905 100
People *vs.* Union, etc., Co., 63 Misc., 132 44

Page.

Poilhemus' Estate, 145 N. Y. S., 1107 18
Polloch *vs.* Farmers' Loan & Trust Co., 157 U. S., 429, 490 .... 44, 45
Postal, etc., Co. *vs.* City of Newport, 247 U. S., 464 61
Price *vs.* Hopkins, 13 Mich., 318 58
Provident Association *vs.* People (1902), 198 Ill., 469; 64 N. E., 1031 19
Pullen *vs.* Wake Co. (1872), 66 N. Car., 361 28
Reish *vs.* Commonwealth, 106 Pa. St., 521 85
Ripley, Matter of, 192 N. Y., 536; 84 N. E., 1129 40
Roby *vs.* Colehour, 146 U. S., 153; 36 L. Ed., 922 62
St. Louis, etc., Co. *vs.* Starbird, 243 U. S., 592; 61 L. Ed., 917 ... 62
Schemerhorn's Estate, Re, 149 N. Y. S., 95 86
Seaman, Matter of, 147 N. Y., 69 ..... 88, 107, 145
Seibert, Appeal of, 110 Pa. St., 329 84
Sharer, In re, 73 N. Y. S., 1057 100
Sharp *vs.* Blankenship, 59 Cal., 288 44
Short's Estate, In re, 16 Pa. St., 66 ..... 71, 103
Glosson's Estate, 216 N. Y., 79; 110 N. E., 1007 40
Smith, In re (1912), 135 N. Y., 240 ..... 24, 30
Spreckels *vs.* Spreckels, 116 Cal., 339 44
Standard Oil Co. *vs.* Graves, No. 13, U. S. Sup. Ct. Adv. Op., 412 (1918-19) 63
Stanford, Estate of, 126 Cal., 122 93
State *vs.* Bullen, 143 Wis., 512 98
State *vs.* Furnell, 29 Mont., 260; 51 Pac., 207 ..... 71, 102
State *vs.* Mollier (Kans.), 152 Pac., 771 87
State *vs.* Probate Court, 102 Minn., 268; 13 N. W., 888 ..... 38, 128
State *vs.* Safe Deposit Trust Co. (1918), 132 Md., 251; 103 Atl., 435 37
Stevens *vs.* Bradford, 185 Mass., 439; 70 N. E., 425 60
Stockdale *vs.* Insurance Companies (1874), 87 U. S., 323 44
Tenant *vs.* Tenant Memorial Home (1914), 167 Cal., 570; 140 Pac., 242 49
Teralta Land Co. *vs.* Shaffer, 116 Cal., 518 44
Terre Haute & Indianapolis R. R. Co. *vs.* Indiana, 194 U. S., 579, 589 62
Thomas *vs.* United States, 192 U. S., 363; 48 L. Ed., 481 41
Thompson, Matter of, 87 Misc., 539 18
Town of Bellevue *vs.* Peacock, 12 S. W., 1042 (Ky.) 43
Union Pac. R. R. Co. *vs.* Public Service Com., 248 U. S., 67 61
Union Refrigerator Co. *vs.* Kentucky, 199 U. S., 194; 50 L. Ed., 159 43
Valentine, Matter of, 91 Misc., 203 18

	Page.
Vandalia R. R. Co. vs. South Bend, 207 U. S., 359	62
Vanderbilt, Matter of (1902), 172 N. Y. 69, 64 N. E. 782	22, 39
Wall vs. Wall, 64 Am. Dec., 152	114
Ward vs. Love County, 253 U. S., —, decided April 25, 1920	62
Warriner vs. People (1880), 6 Dem. (N. Y. Surr.), 211	10, 11
Webber, In re, 156 N. Y. 8, 557	18
Wellborn vs. Weaver, 65 Am. Dec., 235	117
West Chicago, etc., Co. vs. Illinois, 201 U. S., 506; 50 L. Ed., 845	62
Westhus vs. Union Trust Co., 164 Fed., 795	101
Whartman vs. Philadelphia, 33 Pa. St., 202	58
Williams, Estate of, 40 Nev., 239; 161 Pac., 741	75, 78
Wright vs. Blakeslee, 101 U. S., 174; 25 L. Ed., 1048	70

MISCELLANEOUS CITATIONS.

Article on taxation of powers of appointment by Delger Trowbridge, 8 California Law Review, 216	68
Civil Code of California, section 863	118
Civil Code of California, section 2251	56
Civil Code of California, section 2280	55
Cooley on Constitutional Limitations, 7th ed., p. 507	67
39 Cyc., 79	56
39 Cyc., 92	56
9 Cyc., 964	135
Findings and judgment in Estate of Miller, Appendix B	166
Inheritance Tax Act of Nevada (Stats., 1913, p. 141), Appendix A	149
1 Kent's Commentaries, 465	43
1 Perry on Trusts, 6th ed., section 104	56

IN THE

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OCTOBER TERM, 1920.

Numbers 268 and 269.

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STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

BRIEF FOR PLAINTIFFS IN ERROR AND PETITIONERS.

Statement of the Case.

These cases both involve the same questions and are both brought to this court on writ of error to review the judg-

ments therein by the Supreme Court of the State of Nevada. Petitions are also pending in this court for writs of certiorari, the consideration of which have been postponed by the court until the argument on the writs of error.

The first case was entitled *Cole vs. Nickel* in the State court and was a statutory proceeding for the purpose of having a transfer tax assessed against 119,871.75 shares of stock in Miller & Lux, Incorporated, a corporation, formerly belonging to one Henry Miller. The second case was entitled *Nickel vs. State of Nevada* in the State court, and is a statutory suit to quiet title to the same shares of stock as against the claim of the State of Nevada to a transfer tax thereon. Both proceedings were brought under chapter 266 of the Statutes of Nevada of 1913, which is set forth in an appendix to this brief. As the record in both cases is identical, but the paging different, we shall, for convenience, refer to the record in the case of *Cole vs. Nickel*, No. 268, unless otherwise expressly noted.

The act in question (Stats., 1913, p. 411) was approved March 26, 1913, but did not go into effect until April 25, 1913 (Stats. of Nevada, 1913, p. 422, section 31). The act in question imposed a tax upon the *transfer* of all property "which *shall* pass in trust or otherwise by will or by the statutes of inheritance of this or any other State, or by deed, grant, sale, or gift made without valuable and adequate consideration in contemplation of death of the grantor, vendor, assignor, or donor, or intended to take effect in possession or enjoyment at or after such death."

It appears that prior to April 17, 1913, Henry Miller was the owner of 119,871.75 shares of stock in Miller & Lux, Incorporated, a corporation organized under the laws of Nevada

(fol. 287). This corporation owned no property in the State of Nevada, but it in turn owned all of the capital stock of the Pacific Live Stock Company, a corporation organized under the laws of California (fol. 286). This latter corporation owned certain real estate and personal property in Nevada (fols. 285-7, 1754-5), and by reason of such ownership the State of Nevada seeks to assess the transfer tax in question on the transfer of the stock in question.

Henry Miller was during the times mentioned not a resident of the State of Nevada, but was a resident of the city and county of San Francisco, State of California, but to the extent that such stock represented property situated in Nevada it is claimed to be taxable under section 1 of the aforesaid act of 1913, which provides:

> "For the purposes of this act, the ownership of shares of stock in a corporation owning property in this State shall be considered as the ownership of such interest in the property so owned by such corporation, as the number of shares so owned shall bear to the entire issued and outstanding capital stock of such corporation."

It will be seen from this that the stock in Miller & Lux, Incorporated, had a technical situs merely in the State of Nevada owing to its incorporation in that State, and also had a situs in the State of California where it was owned. It is not disputed by the plaintiffs in error and petitioners that it was technically subject to a transfer tax by the State of Nevada if the transfer is otherwise subject to the act, which is disputed by them for the following reasons:

The act in question was approved March 26, 1913, but by the express terms of the act did not go into effect until thirty

days thereafter, or April 25, 1913 (Stats., 1913, p. 411, section 31, Appendix, p. 149).

On April 17, 1913, *and before the effective date of this act*, Henry Miller made, executed, and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, as trustees, by which all of this stock was transferred to them upon certain trusts in said deed specified. The deed of trust is found at folios 101-159, and is in the ordinary form of a deed of trust of this character, being denominated "Deed of Trust," containing the date, the names of formal parties, a recital of a consideration, followed by the usual words of grant of the property described. This is followed by the habendum clause:

> "To have and to hold the same as such trustees upon the following uses and trusts and for the following uses and purposes, that is to say:
>
> I.
>
> "1. During the lifetime of the said party of the first part, the said trustees shall receive the rents, issues, and profits of said property, and pay the same to the party of the first part during the term of his natural life.
>
> II.
>
> "1. Upon and after the death of the party of the first part, the said trustees shall take and hold all of said property, and shall convert sufficient thereof into cash to pay the several amounts hereby directed to be paid, and shall collect the rents, issues, and profits thereof, and said property and the proceeds of sale thereof and the income therefrom shall be by them applied in the manner hereinafter set forth."

The deed then proceeds to direct the payment of numerous sums of money by the trustees to certain designated parties, the application of certain sums by the trustees to certain charitable purposes, the payment of the income of the property to certain persons during their lives, and then provides that upon their death the property shall "pass to, vest in, and is hereby conveyed to" certain persons therein described.

The deed of trust is signed and sealed in the ordinary manner, is acknowledged before a notary public, and attached to it is the written acceptance of the trust by the trustees, dated April 17, 1913, and acknowledged by them before a notary public on the same date.

On the same date Henry Miller made a will denominated "The last will and testament of Henry Miller," which will be found at folios 26 to 100 and duly attested as required by law for the execution of a will. This will made no express disposition of or reference to the shares of stock transferred by the deed of trust. The only reference in the deed to the will is the following clause found at folios 152 to 153:

> "If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provision herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein."

In the petition in *Cole vs. Nickel*, the Controller alleged the execution and delivery of this deed, and alleged "that on or about the 17th day of April, 1913, the deceased, Henry Miller, made, executed, and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, as trustees" (fols. 17-18), and this deed of trust is set forth as an exhibit to the petition of the Controller (fols. 100 *et seq.*). While it is alleged in the petition that the deed was made in contemplation of death and was intended to take effect *"in possession or enjoyment,"* at or after death, there was no suggestion made that the deed of trust was not in fact a deed of trust, or was not made, executed, and delivered at its date, or did not presently pass title to the property therein described. The trial court found that the deed of trust was made, executed, and delivered on that date, the finding being in the following language:

> "That on April 17, 1913, Henry Miller, deceased, made, executed, and delivered that certain deed of trust, dated April 17, 1913, and recorded in Book 972 of Deeds (N. S.), page 170, of the county recorder's office of the city and county of San Francisco; a copy of said deed of trust is annexed to the petition in this action. That Nellie Miller Nickel and J. Leroy Nickel were designated as trustees under and by virtue of said deed of trust, and that the said trustees on the same day, to wit, April 17, 1913, accepted the said trust, by an endorsement in writing thereon, duly signed and acknowledged by them, which is likewise made a part of the petition herein. That on the same day said Henry Miller, deceased, duly and regularly executed his last will and testament, a copy of which is attached to the petition and made a part thereof. That at the time the said deed

of trust and said will were executed by the deceased, Henry Miller, he was an invalid, under medical care and treatment, and afflicted with physical ailments from which he never recovered. That said trust deed was recorded in the city and county of San Francisco, October 20, 1916. That said deed of trust was never recorded or placed of record in the State of Nevada, or any of the counties thereof. That prior to October 20, 1916, said deed of trust had been kept in a safety deposit box, to which the trustees, J. Leroy Nickel and Nellie Miller Nickel, had exclusive access. That in the same safety deposit box there was deposited on or about April 17, 1913, certificates of stock of Miller & Lux, Incorporated, which said certificates of stock were endorsed, assigned, transferred, and delivered by the said Henry Miller to said trustees on the same day as the execution of said deed of trust" (fols. 1761-5).

The trial court also found that on the same date, Henry Miller endorsed, assigned, transferred, and delivered the stock to said trustees (fol. 1865). On the same date, the stock was transferred on the books of the corporation to the trustees (fols. 1609-21, 1645-67, 361-87, 1718-19). The trustees immediately had the old certificates of stock surrendered and had new certificates of stock issued to and in the names of the trustees (fols. 1609-15). The new certificate is found at folios 1650 to 1653 in the name of Nellie Miller Nickel and J. Leroy Nickel, trustees, dated April 13, 1917. See also to the same effect, folios 375-9. These facts are not only all found by the trial court, but were established by uncontradicted evidence.

At the time of the execution of this deed of trust, Henry Miller was 86 years of age, confined to his home by illness,

and three and one-half years later died on the 14th day of October, 1916 (fol. 1775). There is evidence in the record which the State contends shows that the deed of trust was made in contemplation of death, and it also contends that at all events the estates created thereby, other than the estate in favor of the grantor, Henry Miller, took effect *in possession or enjoyment* at or after death within the meaning of the Inheritance Tax Law.

As to the latter contention, it is claimed by the State that any transfer or trust by which the income is payable to the grantor during his life and to the beneficiaries after his death does not take effect as to such beneficiaries *in possession or enjoyment* until after the death of the grantor. It might be said in passing that there are many decisions in other jurisdictions to this effect, and we conceded in the State court and concede here that if this act had been in force at the time of this transfer, the same would have been subject to the taxes imposed by that act. The position we took in the State court, and which we take in this court, is that whether in fact in contemplation of death or in law intended to take effect *in possession or enjoyment* at or after death, the transfer at its date created vested interests to which the act going into effect subsequently could not apply.

It should be noted that transfers in "contemplation of death" within the meaning of this act are not limited to gifts *causa mortis*, but include gifts *inter vivos* "made in lieu of or to avoid the passing of the property transferred by testate or intestate laws" (Stats. of 1913, sec. 30, p. 422), and the State claims that the transfer was of this character. No claim is made that the transfer was technically a gift *causa mortis*.

In their answer in the case of *Cole vs. Nickel*, the plaintiffs in error and petitioners herein, set up and alleged their reliance on the provisions of the Constitution of the United States in the following language:

> "Further answering the said petition the said defendants allege that at the time of his death the said Henry Miller owned no property whatever situate within the State of Nevada, and owned none of the property described in said petition, but, on the contrary, the said Henry Miller transferred and conveyed all of the said property to these defendants by the said deed of trust, on the 17th day of April, 1913, and the said trustees thereupon became and ever since have been the owners, and in the possession, and entitled to the possession of the same, and the whole thereof, and their rights thereto and therein vested upon the said 17th day of April, 1913, and prior to the date upon which the said act approved March 26, 1913, went into effect; that the said act is not and was not intended to have any retroactive effect or to apply to any transfers made prior to the date upon which the same went into effect, nor to any estates or rights which vested prior to that time; that if the said act, however, be construed or held to be retroactive or to apply to a transfer made prior to said date, or to rights which vested prior to said date, then the same is to that extent unconstitutional, invalid, and void, for the following reasons:
>
> "(*a*) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(*b*) That the same takes the property of these defendants and of the beneficiaries under the said deed of trust for a public use, without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(*c*) That the same denies to these defendants and to the beneficiaries under the said deed of trust the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(*d*) That the said act impairs the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

"And said defendants hereby invoke the benefit of the said provisions of the Constitution of the United States, and of each and all thereof."

(Fols. 179-189.)

In the exceptions of the plaintiffs in error and petitioners to the findings, and in their request for additional findings in the case of *Nickel vs. State of Nevada*, they set up their reliance on the provisions of the Constitution of the United States in the following language:

"Said plaintiffs hereby request the court to make the following additional finding, to wit: 'That all of the said shares of stock vested in the said trustees and the interests of said several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective, and that the same were not subject to the inheritance tax or transfer tax under the provisions of the said act, and that said act was not retro-

active, and did not intend to tax the transfer which took place before the effective date of the said act, and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the plaintiffs and of the beneficiaries under the said deed of trust without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and would take the property of the plaintiffs and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States; that the same would deny to the plaintiffs and to the beneficiaries under said deed of trust the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States and impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States."

(Fols. 1767-72.)

And, in their specifications of particulars in which the evidence was insufficient to justify the findings in said cause, they again there asserted their reliance on the Constitution of the United States in the following language:

"In this, that the court failed to find that all of said shares of stock vested in said trustees and the interests of said several beneficiaries under the said deed of trust vested in said beneficiaries on the 17th day of April, 1913, and prior to the date upon which the inheritance tax law of the State of Nevada became effective, and that the same were not subject to the inheritance tax or transfer tax under the provisions of the said act, and that said act was not retroactive, and did not intend to tax the transfer which took

> place before the effective date of the said act, and that to give the same a retroactive effect and to make the same applicable to such a transfer would take the property of the plaintiffs and of the beneficiaries under said deed of trust without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and would take the property of the plaintiffs and of the beneficiaries under said deed of trust for a public use without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States; that the same would deny to the plaintiffs and to the beneficiaries under said deed of trust the equal protection of the law, in violation of the Fourteenth Amendment to the Constitution of the United States, and impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States."
>
> (Fols. 1798-1802.)

The trial court upheld the claim of the State of Nevada to the tax in question, filing a written opinion, which will be found at folios 1723 *et seq.* It should be noted also that the judgment in the case of *Nickel vs. State of Nevada* expressly adjudges that the trustees *under the deed* are the owners of the stock in question. As we have seen, that case was brought by "Nellie Miller Nickel and J. Leroy Nickel, as trustees under that certain deed of trust dated April 17, 1913, made, executed, and delivered by Henry Miller to Nellie Miller Nickel and J. Leroy Nickel, as trustees, and recorded in Book 972 of Deeds (N. S.), page 170, in the County Recorder's Office in the City and County of San Francisco, State of California," and the judgment adjudges, "And it is further ordered, adjudged, and decreed that sub-

ject to the said lien, plaintiffs are the owners of said 117,871.75 shares of stock, and their title thereto, subject to said lien, is hereby quieted against defendant" (fols. 140-41 in case No. 269).

The Supreme Court of the State of Nevada is composed of a chief justice and two associate justices, and two of the justices filed an opinion affirming the judgments of the trial court (pp. 636-649), the third justice filing a dissenting opinion fully upholding the contentions of the plaintiffs in error and petitioners (pp. 649-665). Subsequently, a petition for a rehearing was granted by the court, and a second opinion filed, concurred in by two of the justices, again affirming the judgments (pp. 668-73), Chief Justice Coleman still dissenting (p. 674).

In the first opinion of the majority of the court, it was sought to avoid the constitutional question by deciding as a matter of construction that the act of 1913 was not intended to operate upon a transfer or trust made prior to the effective date of the act, but the court held that the deed was not a deed, but was testamentary in character and that it was subject to revocation. On the rehearing we showed that the deed clearly was not testamentary in character and no power of revocation was reserved, and that it was in law irrevocable, and in the second opinion it is difficult to determine how far the court receded from its first opinion, but, at all events, the court again expressly reasserted its decision that if any vested interest was created by the deed, it would not be subject to tax under the act which was not in effect at the date thereof, but still reiterated its decision that no vested rights were created by the deed and that no estates were conveyed thereby.

In this court we shall contend that the grounds urged in these opinions and by which it is sought to avoid the constitutional rights relied upon are merely colorable and have no substantial basis in law or fact. In our consideration of the case we shall carefully review both of the opinions by the majority of the Supreme Court of Nevada, but shall not again refer to the dissenting opinion, but refer the court to it as containing a full and clear exposition of the law and decisions on which we rely (pp. 649-665).

ASSIGNMENT OF ERRORS.

I.

The court erred in holding that the act of the State of Nevada known as chapter 266 of the Laws of Nevada of 1913, imposing a transfer tax on a deed of trust made, executed, and delivered on the 17th day of April, 1913, and prior to said act going into effect, was not in violation of the Constitution of the United States.

II.

The court erred in holding that the said act of the Legislature of the State of Nevada imposing such a tax did not take the property of the appellants without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

III.

The court erred in holding that the imposing of said tax did not take the property of the appellants for a public use

without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV.

The court erred in holding that said act in imposing said tax upon said transfer does not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

V.

The court erred in holding that said act in imposing said tax does not impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

VI.

The court erred in holding that the authority exercised under said act of the State of Nevada does not take the property of appellants without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

VII.

The court erred in holding that the authority exercised under the said act of the State of Nevada does not take the property of appellants for a public use without just compensation, in violation of the Fourteenth Amendment to the Constitution of the United States.

VIII.

The court erred in holding that the authority exercised under the authority of the said act of the Legislature of the State of Nevada does not deny to the appellants the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

IX.

The court erred in holding that the authority exercised under the said act of the Legislature does not impair the obligation of contracts, in violation of section 10 of article 1 of the Constitution of the United States.

X.

The court erred in holding that if the said act of the State of Nevada be construed to have a retroactive effect or to apply to transfers made prior to the date upon which the same went into effect or to estates or rights which vested prior to that time, it would not be unconstitutional or in violation of the Constitution of the United States, and would not take the property of the appellants without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and would not take the property of appellants for a public use without due compensation, in violation of the Fourteenth Amendment to the Constitution of the United States, and would not deny to the appellants the equal protection of the laws, in violation of the Fourteenth

Amendment to the Constitution of the United States, and would not impair the obligation of contracts, in violation of section 10 of article I of the Constitution of the United States.

ARGUMENT.

I.

TO IMPOSE A TRANSFER OR INHERITANCE TAX UPON A TRANSFER MADE BEFORE THE ACT IMPOSING THE TAX BECOMES EFFECTIVE DEPRIVES THE OWNERS OF THE ESTATES CREATED BY SUCH TRANSFER OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND TAKES THEIR PROPERTY FOR A PUBLIC USE WITHOUT JUST COMPENSATION AND DEPRIVES THEM OF THE EQUAL PROTECTION OF THE LAW, IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND IMPAIRS THE OBLIGATION OF CONTRACTS, IN VIOLATION OF SECTION 10, ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES, AND THIS IS TRUE ALTHOUGH THE TRANSFER MAY HAVE BEEN MADE IN CONTEMPLATION OF DEATH OR INTENDED TO TAKE EFFECT IN POSSESSION OR ENJOYMENT AT OR AFTER DEATH. IF THE ESTATE TRANSFERRED VESTS IN INTEREST BEFORE THE ACT BECOMES EFFECTIVE THE ACT CANNOT APPLY, ALTHOUGH THE ESTATE VESTS IN POSSESSION OR ENJOYMENT THEREAFTER.

After the passage of various inheritance tax acts imposing taxes on certain transfers *inter vivos* the courts very generally held that such acts should not be construed retroactively so as to apply to transfers made before the effective date of the act, although the possession or enjoyment did not accrue

until after that date. Among the cases so holding with respect to deeds we might cite:

In re Hendrick's Estate (1888), 3 N. Y. Suppl., 281;
Morrow vs. Depper, 153 Iowa, 341; 133 N. W., 729;
Lacey vs. State Treasurer (1911), 152 Iowa, 477; 132 N. W., 883;
Commonwealth vs. McCauley's Executor (1915), 166 Ky., 450; 179 S. W., 411;
In re Haight's Estate (1912), 136 N. Y. Suppl., 557;
McClain vs. Penn. Co., 108 Fed., 618;
In re Webber, 136 N. Y. Suppl., 557; followed in *Pedkemus' Estate*, 145 N. Y. Suppl., 1107;
Haley's Estate, 152 N. Y. Suppl., 732;
In re Keeary, 194 N. Y., 281;
Matter of Thompson, 87 Misc., 539;
Matter of Valentine, 91 Misc., 203;
In re Hoge's Estate, 215 N. Y., 447; 109 N. E., 559

The same rule was also very generally applied by the courts to estates created by will which became effective by death prior to the effective date of the act, but under which possession or enjoyment did not accrue until a later date. Among the cases of this character the following may be cited:

Howe vs. Howe (1901), 179 Mass., 546; 61 N. E., 225;
Carter vs. Whitcomb (1908), 74 N. H., 482; 69 Atl., 779;
Eury's Executors vs. State (1905), 72 Oh. St., 448; 74 N. E., 650;
In re Forsyth's Estate (1894), 32 N. Y. Suppl., 175;

Gilbertson vs. Ballard (1904), 125 Iowa, 420; 101 N. W., 108;

Warriner vs. People (1889), 6 Dem. (N. Y. Surr.), 211;

In re Miller, 110 N. Y., 223; 18 N. E., 139;

In re Lambard, 88 Me., 505; 34 Atl., 530;

Commonwealth vs. Wellford (1913), 114 Va., 372; 76 S. E., 917;

Miller vs. McLaughlin (1905), 141 Mich., 425; 104 N. W., 777;

In re Collateral Inheritance Tax (1896), 88 Me., 587; 34 Atl., 530;

Provident Association vs. People (1902), 198 Ill., 409; 64 N. E., 1031;

Arnaud vs. Executors (1832), 3 La., 336;

Succession of Ogen (1844), 6 Rob. (La.), 504.

To avoid these decisions several States passed amendments to their inheritance tax acts by which they attempted to impose so-called transfer taxes on certain classes of transfers *inter vivos*, made before the passage of the act, but under which possession and enjoyment occurred after that date, and such statutes have universally been held unconstitutional, as appears by the following authorities:

New York:

In re Pell (1902), 171 N. Y., 48; 63 N. E., 789.

This decision was on appeal from the decision of the appellate division in the same case (*In re Pell* (1901), 60 App. Div., 286; 70 N. Y. Suppl., 196). In that case a remainder

vested by will in 1863 when the testator died, the remainderman came into possession in 1899 after the New York Statute of 1899 was passed, and which attempted to levy a transfer tax on past transfers. In holding this act to be unconstitutional the court said:

> "The language of this amendment of 1899 would seem to include all remainders created by deed or will which come within the restrictive time limitation therein fixed. Legislation which impairs the value of a vested estate is unconstitutional. *Germania Sav. Bank vs. Suspension Bridge*, 159 N. Y., 362; 54 N. E., 33. * * *
>
> "This court and the Supreme Court of the United States have held in numerous cases that the transfer tax is not imposed upon property, but upon the right of succession. It therefore follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation. In the case before us it is an undisputed fact that these remainders had vested in 1863, and the only contingency leading to their divesting was the death of a remainderman in the lifetime of the life tenant, in which event the children of the one so dying would be substituted. If these estates in remainder were vested prior to the enactment of the transfer tax act, there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so, to impose a tax based on the succession would be to diminish the value of these vested estates, to impair the obligation of a contract, and take private property for public use without compensation."

Matter of Lansing (1905), 182 N. Y., 238; 74 N. E., 82:

In 1869 a testator left an estate in trust for his daughter during her life, after her death her portion to go to her heirs at law, subject, however, to a power of appointment in her to devise the remainder by will in fee to her heirs at law and collateral relatives in such proportions and manner and with such limitations as she might desire to impose. In 1892 she devised her share of her father's estate to her daughter who was her only heir. It was attempted to tax this under the inheritance tax act of 1897. The court held this was not taxable, saying:

> "Where there is no transfer there is no tax and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because, as we held in the Pell case, such an act imposes no direct tax and is unconstitutional since it diminished the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation. * * *
>
> "Even if her interest was contingent, nevertheless, as was said by Judge Cullen in a late case, the interests of the devisee accrued on the death of the testator and at that instant, and were immune from legislative attack, whether contingent or vested (*Matter of Vanderbilt*, 172 N. Y., 69, 73, citing *Brevoort vs. Grace*, 53 N. Y., 245).
>
> "It is not at all necessary to determine whether the remainder which Mrs. McVickar took under her grandfather's will was vested or contingent. If we assume that the remainder was contingent, nevertheless it was acquired by Mrs. McVickar under her grandfather's will at the instant of his death. It then became a property right in her which was just as

> sacred and just as immune from legislative attack as any other property right (*Breevort vs. Grace*, 53 N. Y., 245)."

This case distinguishes *Matter of Delano*, 176 N. Y., 486, where the exercise of a power of appointment was taxed, on the ground that in the Lansing case the daughter got her share either under the will or under the power, whereas in the Delano case the beneficiary took only one-fourth under his grandfather's will and only got the whole by reason of the exercise of the power.

In the *Delano* case, *supra*, the court used the following language regarding vested rights under deeds:

> "If the power had not been exercised, the question would have resembled that presented by the Pell case, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and non-defeasible, as should result in an aboslute title after the passage of the act. (*Matter of Pell*, 171 N. Y., 48.) In that case the transfer was completed without the aid of a will and the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will."

Matter of Vanderbilt (1902), 172 N. Y., 69; 64 N. E., 782:

> "It is conceded that the statute (Transfer Tax Law 1899) on its face provides for the immediate taxation of the whole corpus of the trust estate, regardless of the fact that the persons who may ultimately receive either the whole or part of such corpus cannot now be ascertained, and for the payment of the tax out

of the fund. I concede that if the statutory scheme creates a property tax it cannot be sustained. I think that such is the doctrine of the Pell case (171 N. Y., 48) in which I fully concurred. But in my opinion the tax now sought to be imposed is not a property tax and the Pell case is not an authority for such a claim. In that case the interests of the devisees and legatees attempted to be taxed were given by the will of the testator who had died long prior to the enactment of any inheritance tax. Technically, they may have been, and probably were, vested subject to be divested by death before the demise of the life tenant, but in the ordinary sense of the term they were contingent, that is to say, it was impossible to determine who would actually enjoy the property until the death of the life tenant. Nevertheless, the interests of the devisee accrued on the death of the testator, and at that instant, and were immune from legislative attack whether contingent or vested (*Breevoort vs. Grace*, 53 N. Y., 245)."

In re Meyer (1903), 83 N. Y. App. Div., 381, 82 N. Y. S., 329:

In this case testator died in 1887 leaving a legacy to his executors in trust to pay the income to his brother and family for life, unexpended remainder to his brother's issue. In 1902 the brother died and the State attempted to tax the remainder under the act of 1902. Held that the law in force in 1887 should govern. The court, after quoting from *Matter of Seaman*, 147 N. Y., 69, to the effect that a remainder created by a will could not be taxed under a statute passed after the testator's death, used the following language:

"If we apply this principle, and if a tax was imposed upon these beneficiaries on this transfer on the

> death of the testator, it would seem to follow that the tax then imposed was the tax and the only tax that the State could enforce, and that a subsequent act to increase that tax would be subject to the same objection that was held fatal to the act under consideration in Matter of Pell, and, therefore, beyond the power of the legislature."

In re Smith (1912), 135 N. Y. S., 240:

In this case a will gave property to trustees in trust for testator's wife for life, remainder to testator's nephews and nieces, and it was held that an inheritance tax act passed after testator's death did not affect the rights of succession of the remainderman, the court saying:

> "I am, however, unable to see the fact that the remainder interests are contingent rather than vested is important or controlling on the question of liability to the transfer tax. The beneficaries' right to the succession to such interests, whether the interests be vested or contingent, accrued when testator's will became effective, prior to the first Transfer Tax Act, and those interests have subsequently vested in the possession and enjoyment of the remaindermen without the intervention of any subsequent testamentary act. *At the instant such right of succession accrued it became immune, as a property right, from subsequent legislative impairment.*"

Matter of Craig (1904), 97 App. Div., 289, 89 N. Y. S., 971:

This was a case of a trust deed, the trustees to pay the income for life to the grantor and the remainder to his widow and any issue. The deed was executed and delivered before

the passage of any inheritance tax act. In holding that it could not constitutionally be taxed, the court said:

> "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent. * * * The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, *and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract.* (Const., art. 1, sec. 6; U. S. Const., art. 1, sec. 10, subd. 1.) In other words, the appellants contend that at least as early as May 9, 1885, they had acquired their rights by irrevocable deed; that such rights, whether vested or contingent, then constituted present property interests in future estates which were vested in the sense that they were secured to them by deed subject only to contingencies as to time and survivorship; that incident to the ownership of such property was the absolute right to its acquisition in possession and enjoyment at the stipulated time; and that such ultimate right of possession and enjoyment, being absolute and not merely privileged, *could not afterwards be taxed by the State because of well-settled principles of constitutional law.* I am inclined to the view that the contention is sound."

Matter of Chapman (1909), 117 N. Y. S., 679:

Here testator created a trust for the benefit of his daughter for life, and at her death the fund to go to such persons as she might appoint, in default of which the fund should go to her issue. She appointed her children to receive the fund. Testator's will was made before any transfer tax existed. The court said:

> "It has been heretofore suggested that the estate which her sons took upon the death of their grandfather, John Davol, was a vested estate in remainder. Even if it were contingent, it was an interest acquired at the instant of their grandfather's death, and became a property right which could not be cut down by the subsequent imposition of a transfer tax."

In re Haggerty (1908), 112 N. Y. S., 1017:

This case (which was affirmed by the New York Court of Appeals in 87 N. E., 1120) approved the rule laid down in Matter of Pell and Matter of Lansing in the following words:

> "It is settled that, where an estate is vested under a will made before the transfer tax statutes were enacted, no tax can be imposed."

Iowa:

Lacey vs. State Treasurer (1911), 152 Iowa, 477; 132 N. W., 843:

In this case an agreement was executed before the Inheritance Tax act was passed by which the grantee was to have

the income of certain property for life with remainder to certain parties. It was held that the legislature had no power to tax the remainders on the grantor's death, the court saying:

> "If the right to the property passed by the conveyance beyond the control of the grantor, it was a vested right; it was not a mere expectancy, like the prospective right of an heir, or the inchoate right of a wife, and *it was therefore not subject to burdens which the legislature might attempt to impose by retrospective laws.* Cooley, Constitutional Limitations (7th ed.), 508, 528.
>
> "Specifically it has been held without apparent conflict in the authorities that an interest in property created by will or deed in the nature of a remainder becomes a vested interest from the time the will or deed takes effect, and that a subsequent collateral inheritance tax statute has no application to it. Thus, where a will creates a remainder subject to a life estate, with an added power given to the life tenant to dispose of the property if he shall elect to do so, the interest of the remainderman is vested as against a subsequent inheritance tax statute, although it may not be possible to determine until the end of the life estate, and after the taking effect of the statute, what portion, if any, of the property will be left for enjoyment by the remainderman. *In re* Langdon, 153 N. Y., 6; 46 N. E., 1034; *In re* Lansing's estate, 182 N. Y., 238; 74 N. E., 882; Winn vs. Schenck (Ky.), 110 S. W., 827. Even though the remainder is so far conditional that it may have to be opened up to let in afterborn children; and, on the other hand, may be divested by death without issue of the person named, nevertheless it constitutes a vested interest not subject to a

subsequent collateral inheritance tax statute, passed before the termination of the life estate. *In re* Seaman, 147 N. Y., 69; 41 N. E., 401. Any attempted legislation imposing a collateral inheritance tax upon interests in remainder, which have become vested by the taking effect of the will creating them, would be unconstitutional. *In re* Pell, 171 N. Y., 48; 63 N. E., 789."

Virginia:

Commonwealth vs. Wellford (1913), 114 Va., 372; 76 S. E., 917:

In discussing the taxability of a remainder which vested under a will before the Inheritance Tax act was passed, after reviewing cases holding this was unconstitutional, the court said:

"These cases sufficiently illustrate the doctrine (which is plain on principle without authority) that a collateral inheritance tax statute, which becomes a law after an estate has vested in interest, cannot apply to such an estate, *though it does not come into the actual possession and enjoyment of the owner until after the passage of the act.*"

North Carolina:

Pullen vs. Wake Co. (1872), 66 N. Car., 361:

In this case the court said:

"It is clear that the legacy cannot be taxed under the act of April, 1871, which does not profess to be retrospective, and *could not constitutionally be so* 'Constitution, Bill of Rights, sec. 32.'"

California:

Hunt vs. Wicht (1917), 174 Cal., 205; 162 Pac., 639:

As this case was decided by the Supreme Court of California, where the parties to the transaction in the cases at bar resided and where the deed of trust was executed and where the property had a situs, we think it wise to quote at some length from the opinion in that case. In holding a statute unconstitutional which attempted to tax a transfer *inter vivos* by an act passed after the transfer but before possession or enjoyment had accrued thereunder, the court said (italics are in original):

> "This proceeding was instituted against Ulrica Garms in the superior court of Los Angeles County for the purpose of having it determined that a tax was due the State from her under our act establishing a tax on gifts, inheritances, transfers, etc. (Stats., 1911, p. 713), on account of a transfer of certain real property to her by her husband, William Garms, having the amount of such tax fixed, and collection of such amount enforced. A demurrer to the petition was sustained, and petitioner refusing to amend judgment was given that the proceeding be dismissed. We have here an appeal from such judgment.
>
> "The whole theory of the petition is that there was an effectual transfer by deed which was subject to a tax under our law. It is on the theory only of such a transfer that the proceeding is based, and any tax claimed. The material facts as to the transfer are substantially stated in the petition as follows: On April 12, 1905, William Garms was the owner of three small parcels of land in Los Angeles County. On that day he 'executed a deed conveying to' said

Ulrica Garms all of said property, 'and thereupon delivered said deed to one Mathilde Wicht in escrow, to be delivered to the grantee therein named, * * *, upon the death of said William Garms.' On April 18, 1913, he died, and on the same day Mathilde Wicht delivered the deed to the grantee named therein. The allegations of these facts are followed in the petition by the following, viz.: 'Your petitioner is informed and believes and therefore alleges that said deed was made, executed and delivered by said decedent as aforesaid in contemplation of his death and without valuable consideration, and that the same was intended to take effect in possession and in enjoyment as to the grantee therein named, respondent herein, after the death of said grantor.' Said far as the statement herein contained as to the intention of the grantor with regard to the taking effect of the deed is concerned, it must necessarily be limited to his intention as to the mere actual possession and enjoyment of the property conveyed incidental to the ownership of a life estate therein, and cannot be taken as alleging an intention that title to the property should not immediately pass to the grantee upon the delivery of the deed in escrow. Otherwise we would have no operative transfer at all, and consequently nothing whatever upon which to base this claim for a tax. The case would fall within the rule declared in *Williams ex. Kidd*, 170 Cal. 631, 637, as follows: 'So, too, if it be the intention of the grantor when he deposits a deed that it shall only be delivered to the grantee by the depositary after the death of the grantor, *and that the title is to vest only upon such delivery after his death*, then the deed is entirely inoperative as constituting an attempt by the grantor to make a testamentary disposition of his property. This may only be done by will, executed as required

by the law of wills of this State, and a deed, the purpose of which is intended to be testamentary, cannot be given effect.' The petition must be taken as presenting the case of one making an absolute, unconditional conveyance of property and delivering it to a third party to be delivered to the grantee on the death of the grantor, with the intention on his part of making the delivery absolute and placing it beyond his power thereafter to revoke or control the deed. Such clearly was the intention of the pleader.

"Concededly such a transfer may be taxed by the State. The difficulty in the case at bar is that at the time the deed was so executed and delivered to Mathilde Wicht in escrow there was no law imposing any tax on such a transfer as was here made. At that time the so-called 'Collateral Inheritance Act' of 1893 (Stats., 1893, p. 193), was in force, the subsequent act approved March 20th, 1905, which contained a provision repealing the act of 1893, being made by its express terms to take effect only from and after July 1st, 1905. There was no effectual repeal of the act of 1893 prior to the date last named. The act of 1893 expressly excepted from the operation of its provisions any transfer to specific relatives, including the wife of a grantor. It is conceded here that the grantee was the wife of the grantor at the time of the execution and delivery of the deed in escrow, and that if reliance must be based on the act of 1893, there is no liability for a tax on account thereof. The claim is that the act in force at the time of the death of the grantor, viz.: the act approved April 7th, 1911 (Stats., 1911, p. 713), is the one that governs especially as that act in terms provides for a tax on any transfer by deed 'made without valuable and adequate consideration in contemplation of the death of the grantor * * * , or

intended to take effect in possession or enjoyment at or after such death,' when the party taking becomes beneficially entitled in possession or expectancy to any property or the income therefrom, by any such transfer, *whether made before or after the passage of this act.*' The words we have italicized are relied on as clearly showing an intention to impose the tax on transfers previously fully and effectually made. It may be conceded for the purpose of this decision that such was the intent. The question then is whether such a retroactive effect may lawfully be given to the statute.

"The well settled effect of such a transaction as is shown by the petition is well stated by Mr. Justice Lorigan in the opinion in *Williams vs. Kidd*, 170 Cal., 631, which was concurred in by all the members of the court: It was said: 'It is well settled that a person may make a conveyance of property and place it in the hands of a third party to be delivered to the grantee named in it on the death of the grantor, *and that such a delivery will be effectual to pass a present title to the property to the grantee* if the intention of the grantor is to make such delivery absolute and place it beyond the power thereafter to revoke or control the deed. Where delivery is made under these circumstances and with this intention *it is fully operative and effective to vest a present title in the grantee, the grantor retaining only a life estate in the property*, and the third party or depositary holds the *deed* as a trustee for the grantee named in it. (*Bury vs. Young*, 98 Cal., 451; *Moore vs. Trott*, 156 Cal., 353.)' (The italics are ours.) Other decisions such as *Keyes vs. Meyers*, 147 Cal., 702; *Estate of Cornelius*, 151 Cal., 550; *Hudson vs. Kelley*, 162 Cal., 656, may be cited in support of this statement of the law in this State. We have

then the case of a grant of land so executed and delivered on April 12th, 1905, as to be fully operative and effective on that date to vest a *present title* in the grantee, subject only to a life interest in the grantor; 'an extended conveyance,' (*Estate of Cornelius, supra*), of this property in fee simple absolute, subject only to this life interest. Could the legislature subsequently lawfully impose a succession tax upon this fully executed *transfer of title*, such tax accruing at the termination of the grantor's reserved life estate, simply because in the meantime the grantee was debarred by the intervening life estate from actual possession of the property conveyed and the other incidents of a life estate? It appears to us that to state the question is to answer it. The succession to the property by the grantee, which is the thing attempted to be taxed, was complete upon the delivery of the deed in escrow, notwithstanding the reservation of the life estate. The whole estate conveyed vested irrevocably in interest at once, notwithstanding that actual possession of the property itself and enjoyment of the profits thereof were deferred until the death of the life tenant. His death added nothing to the title theretofore acquired by the grantee, and there was no transfer of any property in any legal sense at the time of such death, or at any time subsequent to the delivery in escrow. The right of the grantee to have actual physical possession of the property itself, and enjoyment of the other incidents of an estate for life upon the death of the life tenant was absolutely vested by the delivery of the deed in escrow, and non-defeasible, and the legislature could not thereafter lawfully destroy, impair or burden this property right under the guise of a succession tax on account of the transfer. As said in *Matter of Craig*, 97 N. Y.

App. Div., 289 (affirmed 181 N. Y., 551): 'The underlying principle which supports the tax is that such right (the right of succession) is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But when the privilege has ripened into a right it is too late to impose conditions of the character in question, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guarantees.' It is the vesting in interest that constitutes succession, and the question of liability to such a tax must be determined by the law in force at that time. This view is not opposed to *Estate of Woodard*, 153 Cal., 39, cited by appellant, where the statute in force at the time of death of a testator was held applicable, rather than a later act, simply because it was at the time of such death that the estate vested in the devisee and legatee. What we have said appears perfectly clear on principle, and is sustained by practically all of the authorities in other States where the question has arisen. In New York the matter is thoroughly settled by several decisions. In the *Matter of Pell*, 171 N. Y., 48, 55, it is said that such a transfer tax being one not imposed on property but upon the right to succession, it 'follows that where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation.' And also 'If these estates in remainder were vested prior to the enactment of the Transfer Tax act there could be in no legal sense a transfer of the property at the time of possession and enjoyment. This being so to impose a tax based on the succession would be to dimin-

ish the value of these vested estates, to impair the obligation of a contract and take private property for public use without compensation.' (See also *Matter of Craig, supra.*) It was said *In the Matter of Delano,* 176 N. Y., 486, referring to *In re Pell, supra:* 'In that case the transfer was completed without the aid of a will and the effect was the same as a deed *inter vivos.* There was no foundation for a succession tax.' There is no New York decision that can fairly be construed as opposed to this view. It is clearly recognized as correct in *The People vs. Carpenter,* 264 Ill., 400, a case relied on for a contrary conclusion, and we have found no case which would sustain a conclusion that where an estate is fully vested by reason of a lawfully executed grant or contract, the legislature may subsequently lawfully impose a succession tax on account of the transfer.

"It is immaterial, so far as the question we have discussed is concerned, that it is alleged that the transfer was made 'in contemplation of his death and without valuable consideration.' The estate conveyed fully vested at the time of the delivery of the deed in escrow, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was then no law imposing a tax on any such transfer."

Estate of Felton (1917), 176 Cal., 663; 169 Pac., 392:

In that case Senator Charles N. Felton on April 21, 1911, transferred certain shares of stock to his son, reserving to himself the income of the property during his life. On April 7, 1911, an inheritance tax act was approved, but by

its provisions it did not go into force until July 1, 1911. A still later act was passed in 1913. It will be noted that as in the case at bar the transfer was made between the date of approval of the act and the date when it went into effect. The trial court held the transfer to be subject to taxation under the act of 1913, but this decision was reversed by the supreme court, the court saying:

> "The most important question relates to the rate of taxation applicable to the transfer of stock from Senator Felton to his son. It is here contended, under the authority of *Hunt vs. Wicht*, 162 Pac., 639, that the rates applicable to the transfer should be those in force at the date of the transfer and not those in effect at the time of Senator Felton's death. But it is suggested that the question here presented is somewhat different from that which was raised and answered in *Hunt vs. Wicht*. It was held by the court in that case that where a gift of property is irrevocably made with the reservation of a life estate in the donor, there being no inheritance tax upon such a gift at the time of the transfer, the property so vested may not be reached by a statute subsequently passed, imposing a tax upon such transfers. Our attention is called to the fact that there was a statute imposing an inheritance tax upon such a gift as this when it was made and that the subsequent statute, which was retroactive by its terms, merely increased the rates. But we can see no escape from the conclusion, under the reasoning of the case of *Hunt vs. Wicht, supra*, that an effective gift such as this may not be subject to taxation under the schedule provided by a statute subsequently passed. It was error, therefore, to assess the amount of the inheritance tax according to the statute of 1913 instead of that of 1905, in force at the time when the stock was transferred."

The Supreme Court of California followed the same rule in *Estate of Gurnsey* (1918), 177 Cal., 211; 170 Pac., 402.

As we shall show hereafter, the Supreme Court of California has adopted the same rule in regard to the identical transfer involved in the case at bar, and held it not to be subject to a transfer tax under acts passed after the execution of the deed but before possession vested thereunder.

Maryland:

State vs. Safe Deposit & Trust Company (1918), 132 Md., 251; 103 Atl., 435.

In reaching the same conclusion in this case, the court, among other things, said:

> "There have been many decisions as to the applicability of succession and collateral inheritance taxing statutes, enacted between the time of the death of a testator and the passing into possession of remainder interests created by the will, and it has been practically uniformly held that while a change of the statute with regard to the mode of procedure for the ascertainment of the value of the estate, or for the collection of a tax, was valid and applicable, that it was inapplicable to affect the substantive rights of an interested party; those became fixed and certain as of the time of the death of the testator. In so far as such statutes operate to affect the rights of the parties they are to be given a prospective interpretation only. The rule is generally equally applicable whether the remainder be a vested or contingent one. *Lacey vs. State Treasurer*, 152 Iowa, 477; 132 N. W., 843; *Commonwealth vs. Wellford*, 114 Va., 372; 76 S. E.,

917; *Hunt vs. Wicht*, 174 Cal., 205; 162 Pac., 639; L. R. A., 1917 C, 961; *Carter vs. Whitcomb*, 74 N. H., 482; 69 Atl., 779; 17 L. R. A. (N. S.), 733; *Howe vs. Howe*, 179 Mass., 546; 61 N. E., 225; 55 L. R. A., 626; *Lambard*, In re Collr. Inh. Tax, 88 Me., 587; 34 Atl., 530; *State vs. Probate Court*, 102 Minn., 268; 113 N. W., 888; *Kansas vs. U. S. Tr. Co.*, 99 Kan., 841; 163 Pac., 156; L. R. A., 1917 C, 975; *Winn vs. Schenck* (Ky.), 110 S. W., 827; *People vs. Carpenter*, 264 Ill., 400; 106 N. E., 302.

"In New York the question has been frequently passed on. *In re Davis' Estate*, 149 N. Y., 539; 44 N. E., 185; *In re Pell's Estate*, 171 N. Y., 48; 63 N. E., 789; 57 L. R. A., 540; 89 Am. St. Rep., 791; *Seaman's Estate*, 147 N. Y., 69; 41 N. E., 401; *In re Langdon's Estate*, 153 N. Y., 6; 46 N. E., 1034; *In re Horbeck's Will*, 161 N. Y., 211; 55 N. E., 850, where the opinion was an exceptionally able one written by former Chief Justice Parker. See, also, elaborate note upon this subject to the case of *Commonwealth vs. Wellford*, 114 Va., 372; 76 S. E., 917; in 44 L. R. A. (N. S.), 419; *Pullen vs. Wake County*, 66 N. C., 361. The rule laid down in these cases is fully recognized by the makers of text books and encyclopedias. See 27 Am. & Eng. Enc. of Law, pp 341-342; 37 Cyc., 1557."

Minnesota:

State vs. Probate Court (1907), 102 Minn., 268; 113 N. W., 888:

In 1903 the decedent transferred stock to his children and they in turn leased the stock to him for life with the reversion to them. He also transferred stock to his wife, who transferred it to her children, who in turn leased it to her for

life, reversion to them. After this an inheritance-tax act was passed and it was attempted to tax the stock reverting to the children from the decedent on his death in 1905 after the passage of the act. The court held that these transfers and conveyances could not be taxed, saying:

> "This law is prospective in its operation, and it is beyond the power of the State, even if it so desired, to subject to its operation property which the owner in good faith disposed of before his death."

The constitutional principle established by these cases is not disputed by a single decision. It has been attempted, however, to avoid it on several grounds, all of which have been held unavailing to change the application of the constitutional principle. Thus:

(1) The mere fact that a deed executed before the date upon which an inheritance tax goes into effect creates estates which are technically contingent, and do not become vested until after the death of the grantor, and after the act becomes effective, does not change this rule.

Matter of Lansing (1905), 182 N. Y., 238; 74 N. E. 882;

Matter of Vanderbilt (1902), 172 N. Y., 69; 64 N. E., 782;

Lacey vs. State Treasurer (1911), 152 Ia., 477; 132 N. W., 883;

In re Smith (1912), 135 N. Y. Suppl., 240;

Matter of Craig (1904), 89 N. Y. Suppl., 971; 97 App. Div., 289.

(2) Even if the deed contains a power of revocation, but that power is not in fact exercised, the same rule applies.

Commonwealth vs. McCauley's Executor (1915), 166 Ky., 450; 179 S. W. 411;
In re Haight's Estate (1912), 136 N. Y. Suppl., 557.

(3) Even if the deed contains a provision giving or reserving a power of revocation by which the grantor could destroy the grant and appoint the property to someone else, but the power of appointment is not in fact exercised and the property and the estates pass under the deed, the rule is the same.

In re Haight's Estate (1912), 136 N. Y. Suppl., 557;
Matter of Lansing (1905), 182 N. Y., 238; 74 N. E., 882;
Matter of Ripley, 192 N. Y., 536; 84 N. E., 1120;
In re Slosson's Estate, 216 N. Y., 79; 110 N. E., 1667;
Matter of Chapman (1909), 117 N. Y. Suppl., 679;
In re Morgan, 149 N. Y. Suppl., 1022.

(4) This rule does not depend upon when the estates vest *in possession or enjoyment*, but when they vest *in interest*, nor is it in any way affected by the motive of the transfer, or the fact that it was made in contemplation of death.

Howe vs. Howe (1901), 179 Mass., 546; 61 N. E., 225; 55 L. R. A., 626;
Carter vs. Whitcomb (1908), 74 N. Y., 482; 69 Atl., 779;
Eury's Executors vs. State (1905), 72 Ohio St., 448; 74 N. E., 650;
In re Forsyth's Estate (1894), 32 N. Y. Suppl., 175;
Gilbertson vs. Ballard (1904), 125 Iowa, 420; 101 N. W., 108;

Warrimer vs. People (1888), 6 Dem. (N. Y. Surr.), 211;
In re Miller, 110 N. Y., 216; 18 N. E., 139;
In re Lambard, 88 Me. 587, 34 Atl. 530;
Commonwealth vs. Wellford (1913), 114 Va., 372; 76 S. E., 917;
McClain vs. Penn Co., 108 Fed., 618.

(5) This same rule applies where the transfer was made between the date of the passage of the act and the date upon which it goes into effect.

Hunt v. Wicht (1917), 174 Cal., 205; 162 Pac., 639;
Estate of Felton (1917), 176 Cal., 663; 169 Pac., 392.

Reasons Underlying Decisions Holding Acts Taxing Past Transfers to be Unconstitutional.

In this connection we consider vested rights and retroactive legislation as applied to vested rights with particular reference to matters of taxation.

It being conceded that the act in question cannot be upheld as a property or direct tax, the question arises whether it has the elements essential to an indirect tax. This court passed on the nature of a stamp tax on a transfer of corporate stock in *Thomas vs. United States*, 192 U. S., 363; 48 L. Ed., 481; 24 Sup. Ct. Rep., 305, and in holding it to be an indirect tax, said:

> "The stamp duty is contingent on the happening of the event of sale and the element of absolute and unavoidable demand is lacking."

Obviously if the event has already passed when the tax is imposed there is no way of avoiding the tax and the element

of absolute and unavoidable demand is present. The same view of the nature of the tax was expressed in *New York vs. Reardon*, 204 U. S., 152; 51 L. Ed., 415.

Referring to the same matter in *Keeney vs. New York*, 222 U. S., 525; 56 L. Ed., 299, this court said that the succession tax of 1864 was not a tax on land "since the succession or devolution of the real estate is the subject-matter of the tax * * * whether * * * affected by will, deed, or law of descent." Of course, the devolution of the property by deed occurs at the time of the deed, and that event could not be made the basis of an indirect tax by a law passed after that time. Again, in *Knowlton vs. Moore*, 178 U. S., 78; 44 L. Ed., 984, the court said, as to inheritance taxes, "they concern the *passing* of property by death, and if there was no property *to transmit*, there would be nothing upon which the tax levied on the occasion of death could be computed." So a transfer tax is a tax on the passing of property by deed, and after the property has passed it is impossible to place a tax on the passing. In this case the court also had occasion to state the meaning of the court in the *Pollock case*, in distinguishing between direct and indirect taxes, and stated that it was held that direct taxes were "taxes on persons solely because of their general ownership of property." It would seem clear that a tax upon the transfer of property, imposed before the transfer takes place is an indirect tax, whereas a tax imposed years after the transfer is a tax on persons solely because of their ownership of the property transferred.

There are constitutional limitations on all forms of taxation. We assume that one person could not be taxed with reference to property owned by another. In fact, Chief Justice White said in *Knowlton vs. Moore*, 178 U. S., 41:

> "It may be doubted by some, aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems."

So one should not be taxed because some former owner made a transfer of the property. Assessments cannot be arbitrarily assessed without reference to benefits (*Myles Salt Co. vs. Board of Commissioners*, 239 U. S., 478; 60 L. Ed., 392). They must be levied with some reasonable rule of uniformity (*Union Refrigerator Co. vs. Kentucky*, 199 U. S., 194; 50 L. Ed., 150). Taxes of every form must be levied upon property within the jurisdiction of the taxing power (*Dewey vs. Des Moines*, 173 U. S., 193; 43 L. Ed., 665).

Obviously a tax based on the idea that a privilege is taxed, when the privilege has ripened into a vested right, unconstitutionally impairs that vested right unless all other property of the same kind is taxed, just as much as would an act taking the property or some percentage of it. That vested rights of property are immune from legislative impairment is too well settled to need citation of authority. Retroactive legislation affecting and impairing vested rights has been uniformly held to be unconstitutional (1 Kent's Commentaries, 465; *Town of Bellevue vs. Peacock*, 12 S. W., 1042 (Ky.); *City of Grand Rapids vs. Lake Shore, etc., Ry. Co.*, 89 N. W., 932 (Mich. 1902); *Mogg vs. Hall*, 47 N. W.,

(Mich.), 553; *People ex. Union, etc., Co.*, 63 Misc., 132). This rule has often been applied to legislation imposing taxes (*First National Bank ex. Covington*, 103 Fed., 523; *Teralta Land Co. ex. Shaffer*, 116 Cal., 518; *Sharp ex. Blanchship*, 59 Cal., 288). The same rule has been applied to transfers, and it has been held that an act making them presumptively fraudulent cannot apply to past transfers (*Cook ex. Cockins*, 117 Cal., 140). So the right to transfer property cannot be taken away after the property has been acquired (*Spreckels ex. Spreckels*, 116 Cal., 339).

It might be wise to refer to certain cases which recognize that certain kinds of taxes may have certain retroactive features. These cases were not relied upon in the court below, but as they might be thought to have some relevancy to the case, we here review them. Thus in *Brushaber ex. Union Pac. R. R. Co.* (1916), 240 U. S., 1, this court upheld the Income Tax law which taxed the income for the entire current year, a part of which accrued before the law was passed. The same thing was decided in *Stockdale ex. Insurance Companies* (1874), 87 U. S., 323. It should be remembered that the income tax is a *direct* tax (see *Pollock case*) and the constitutional amendment permitting this form of taxation without apportionment has not changed the nature of the tax in any way. The tax being on certain clearly described property, and being assessed against the person owning and enjoying that property, it may be taxed irrespective of when it was acquired.

Another case which may be cited is *Locke ex. City of New Orleans* (1867), 71 U. S., 172. In that case the legislature authorized a tax to be levied by municipalities upon property on the rolls of two previous years. It was claimed that this

was unconstitutional on account of "supposed retroactive operation." In upholding the tax the court said:

> "There was nothing in the position taken which entitled it to consideration. * * * The act was not subject to the imputation of being retrospective. It did not operate upon the past, or deprive the party of any vested rights. It simply authorized the imposition of a tax according to previous assessment."

Here again it will be noted that the tax was a direct property tax, and the assessment was against the property, irrespective of who owned it, and merely looked to the former assessment-rolls for the valuation and description of the property. It would seem clear that "this limited retroactivity," to use the language of this court, is no authority for the proposition that a past event may be made the basis of a tax. As this court said in the *Pollock case*,

> "There is no such thing in our National Government as unlimited power of taxation in Congress. There are limitations * * * of its powers arising out of the essential nature of all other governments; there are reservations of individual rights without which society could not exist, and which are respected by every government. The right of taxation is subject to this limitation."
>
> *Pollock vs. Farmers' Loan & Trust Co.*, 157 U. S., 429, 599, per Field, J.

The same thing is recognized in the *Brushaber case, supra*, where the court said:

> "This doctrine would have no application in a case where, although there was a seeming exercise of the

taxing power, the act complained of was so arbitrary as to constrain to the conclusion that it was not exertion of taxation, but a confiscation of property; that is a taking of the same in violation of the Fifth Amendment; or, what is equivalent thereto, was so wanting in bases for classification as to produce such a gross and patent inequality as to inevitably lead to the same conclusion."

II.

THE TRANSFER MADE BY THE DEED OF TRUST DATED APRIL 17, 1913, CREATED VESTED RIGHTS IN THE BENEFICIARIES AND THE REMAINDERMEN, AND, NO POWER OF REVOCATION BEING RESERVED, SUCH RIGHTS WERE NOT SUBJECT TO BE DEFEATED BY ANY ACT OF THE GRANTOR, AND SUCH RIGHTS VESTED AT THE DATE OF THE TRANSFER AND NOT AT THE DATE OF THE DEATH OF THE GRANTOR.

The deed of trust transfers the title to the property to the trustees, gives them power to receive the rents, issues and profits thereof, to sell the property and reinvest the proceeds of sale, and directs them to pay the income to the grantor during his life and after his death to certain designated persons, directs them after his death to sell certain of the property and pay certain sums to certain designated beneficiaries, and the remainder, after the termination of the trust is then conveyed to certain persons, or classes of persons designated by the grantor. *No power of revocation is reserved.*

Deed Created Vested Rights.

The legal effect of such a deed of trust has been the subject of consideration in several cases by the Supreme Court

of California, in which State the deed of trust was executed.

In *Nichols vs. Emery* (1895), 109 Cal., 323; 41 Pac., 1089, the deed of trust empowered the trustee to sell the property after the death of the grantor and to divide the proceeds among the beneficiaries *and contained an express power of revocation.* The court held such a deed of trust not to be testamentary in character and to create present estates. The language of the syllabi of the case clearly expresses the decision of the court:

> "Where the owner of real property during his lifetime conveyed it to one of his sons, as trustee, upon trust to sell the land within ten months after the death of the grantor, and to divide the proceeds, one-fifth each to four named children of the grantor, including the trustee, and the remaining part to be invested by the trustee for the benefit of another child of the grantor, and reserved in the conveyance a power of revoking the trust, but continued in possession of the land during the remainder of his life without revoking it, such conveyance immediately passed a vested interest to the trustee, who took the whole estate necessary for the purposes of the trust, there remaining in the grantor the equivalent of a life estate during his own life and entitled him to remain in possession of the land, or to lease it and retain the profits; and the power of revocation contained in the instrument did not operate to destroy or change its character, or to make it a will or testamentary disposition of his property.
>
> "The true test of the character of an instrument as a will is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest; and the ex-

sential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker, and is ambulatory up to that time, and that by its execution the maker has parted with no rights and divested himself of no part of the estate, and no rights have accrued to and no estate vested in any other person.

"In order to create a valid express trust it is essential that some estate or interest shall be conveyed to the trustee, and, when the instrument creating a trust is other than a will, the estate or interest must pass immediately; but it is not essential that there should be an immediate enjoyment of the interest conveyed. Such enjoyment may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.

"The purpose to sell and distribute the proceeds of real property after the death of the grantor is a legal purpose, and the limitation of the term of the trust to his life does not vitiate the trust; and the fact that no disposition was made by the terms of the trust of the interest and estate intervening in time and enjoyment between the date of the deed and the death of the settlor cannot affect the trust.

"The settlor of a trust has the right to reserve a power of revocation; but the trust remains operative and absolute until the right to revoke is exercised in the proper mode.

"A man may give legal expression to his desire to make a disposition of his property in his lifetime, to avoid administration of his estate after his death, either by gifts absolute during life, or by gifts in trust during life, or by voluntary settlement; and there is manifest, in such case, not only an absence of testamentary intent, but an absolute hostility to such intent."

In the case of *Tennant vs. Tennant Memorial Home* (1914), 167 Cal., 570; 140 Pac., 242, the grantor reserved to herself

> "the exclusive possession and the use and enjoyment in her own right, of the rents, issues and profits of said lots and each of them for and during the term of her natural life,"

and also reserved to herself the power to "revoke" the deed, and to sell and convey the property during her life. Notwithstanding these reservations the court held that the instrument was not testamentary in character, but was a valid deed vesting a present estate in the grantee. Among other things the court said:

> "The main contention of the appellants is that the deed in question is not a present grant of property, so far as the remainder is concerned, but is an instrument testamentary in character and therefore invalid as a disposition of the property, because it is not executed with the formalities necessary to the execution of a will.
>
> "The rules by which to determine whether or not an instrument purporting to dispose of property is testamentary in character are clearly stated in *Nichols vs. Emery,* 109 Cal., 323, at page 329 (50 Am. St. Rep., 43; 41 Pac., 1089), as follows: 'The essential characteristic of an instrument testamentary in his nature is, that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker has parted with no rights and divested himself of no modicum of his estate, and *per contra* no rights have accrued to and no estate has vested in any other

person. The death of the maker establishes for the first time the character of the instrument. It at once ceases to be ambulatory, it acquires a fixed status and operates as a conveyance of title. Its admission to probate is merely a judicial declaration of that status. On the other hand, to the creation of a valid express trust it is essential that some estate or interest should be conveyed to the trustee, and, when the instrument creating the trust is other than a will, that estate or interest must pass immediately. By such a trust, therefore, something of the settlor's interest has passed from him and into the trustee for the benefit of the cestui, and this transfer of interest is a present one and in nowise dependent upon the settlor's death. But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future and to depend for its commencement upon the termination of an existing life or lives or of an intermediate estate.'

"That this was said with regard to a conveyance creating a trust does not detract in the least from its force as applied to the case of a conveyance which does not create a trust. The instrument there considered and declared to be not testamentary in nature, was not so held because it created a trust, but because its operation upon the property to pass an interest therein was not deferred until the grantor's death, but was instantaneous upon the execution of the instrument. If it thus operates to pass an interest at the time of its execution, although such interest is in remainder after the termination of the life estate of the grantor, that is, a vested future interest, the mere fact that such remainder, when it comes into the possession of the grantee, will be in the one case his absolute property and in the other a property held by

him in trust for others, is not a factor in the problem and cannot affect the character of the conveyance, or make it otherwise than a present grant of a future estate. * * *

"Another argument presented in favor of the proposition that this deed is testamentary in nature is founded upon the circumstance that the disposition which the grantor thereby made of the property conveyed was substantially the same as she might have made by a will, so far as her enjoyment of the property and her control over the fee is concerned. This circumstance does not determine the effect of the deed and has but little bearing on the question. An instrument is declared to be testamentary in nature only when, and because, it appears from its terms that the intention of the maker thereof was that it should not be operative as a conveyance or disposition of the property, or of any interest, present or future, therein, until his death. This is always essential. If the instrument, according to its proper legal effect under the rules of conveyancing, passes at the time of its execution a present interest or title in the property to a third person, although it may be only an interest in a future estate and may be subject to defeat on the happening or non-occurrence of a future event, it is a present conveyance and not a will. We do not think the fact that if the grantor had not at that time made this deed, but instead had made her will giving this property to the respondent, she would then have continued to enjoy the property until her death, in the same manner and as fully as she did thereafter enjoy it by reason of her reservation in the deed of an estate therein during her life, constitutes a reason for holding the deed to be a testamentary disposition. Notwithstanding these reservations and this privilege of enjoyment, she did then, in fact and in law, convey

> to the grantee the future estate which at her death, became an estate in possession, to said grantee. The deed was not the same, in effect, as a will. It passed a present interest in the remainder, upon the contingency that the grantor should not, during her life, convey to another, or revoke the deed. The will would have had no such effect. The contingencies did not happen, hence the estate is now absolute."

In the case of *Gray vs. Union Trust Co.* (1915), 171 Cal., 637; 154 Pac., 306, the property was conveyed to a trustee to pay the income to the grantor during her life, and remainder was disposed of in the following manner:

> "This trust shall be irrevocable and shall last during the lifetime of said trustor, and upon her death the trust property shall go to and vest as she shall provide in her last will and testament, and leaving no last will and testament, said property shall go to and vest in her heirs at law, according to the laws of succession of the State of California, as such laws now exist."

The grantor thereafter attempted to revoke the deed of trust, claiming that the trust was a mere naked trust and that no estate in remainder was created thereby. In holding that this deed did create estates in remainder, the court made an elaborate review of the authorities, and among other things said:

> "Our Civil Code (section 769) declares that 'When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.' We have in this trust apt language to create such a future estate, dependent for its enjoyment upon the

termination of a precedent life estate. We have therefore apt language to create a remainder, and it is quite permissible that it should be created to commence at a future day and be limited upon a life estate. (Civ. Code, sec. 773.) There is in this trust a power of appointment or nomination reserved to the trustor. It can be exercised in but one way, and that is by her will. But such power of appointment does not prevent the vesting of the future estate in remainder. (Civ. Code, sec. 781.) Everything, then, which the law contemplates shall exist for the creation of equitable remainders or remainders in trust is found in this trust. Whether they be regarded as vested or contingent is immaterial, for in either case the estate and interests are alienable. (*Davis vs. Willson*, 115 Ky., 639 (75 S. W., 696); *McDonald vs. Bayard Sav. Bank*, 123 Iowa, 413 (98 N. W., 1025); *Sikemeier vs. Galvin*, 124 Mo., 367 (27 S. W., 551).) But in truth these remainders are to be regarded as vested remainders, subject to divestiture only upon the exercise of the power of nomination by will reserved to the trustor. * * *

"This concludes the review of all the cases upon which respondent relies, and if it shall be thought that this review does not justify to the fullest extent the comments heretofore made as to their general inapplicability, it may be said in conclusion upon the matter that the question is satisfactorily and conclusively disposed of against respondent's contention by our own decision in *Barnett vs. Barnett*, 104 Cal., 298 (37 Pac., 1049). There was a grant of lands to the 'party of the second part for and during his natural life and to the issues and heirs of the body of the said second party.' This court declaring that under the rule in Shelley's case this language would vest the fee simple absolute in the party of the second

part, held and declared that by force of section 779 of the Civil Code that rule was abrogated and remainders were created, saying: 'By section 779 of the Civil Code the term "heirs" is changed from a work of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Civ. Code, sec. 690), and, therefore, denominated a future interest, is nevertheless an estate in the property capable of being transferred in the same manner as a present interest. (Civ. Code, sec. 699.) Counsel for appellant states in his brief that the only question on this appeal is 'whether the deed in question conveyed an estate in fee simple to plaintiff, or a life estate to plaintiff, with remainder in fee to the issue and heirs of her body'; and we therefore limit our decision to this proposition, and hold that by the instrument in question a life estate only was conveyed to the plaintiff.'

"The conclusiveness of this determination, its immediate and direct bearing upon the language of this trust deed, are so plain as to relieve the question from the need of further discussion."

It will be seen that these are extreme cases, in two of which a power of revocation was reserved and in the other a power to destroy the remainder by the exercise of a power of appointment by will, and still the instruments were held to create vested estates in the property in the remaindermen. In the case at bar, in which no such reservations are found, it must be admitted, therefore, that the deed of trust in

question immediately created the estates which the beneficiaries and remaindermen are to enjoy in this property, although the actual possession and enjoyment thereof may be delayed until a future time. Whether these estates then became vested or contingent, they immediately became existing, and in that sense vested property rights capable of being transferred and conveyed by the beneficiaries and remaindermen, and such estates were created by the deed before the act in question became effective and were not created by the death of Henry Miller.

Under the Law of California the Instrument in Question Was Not Subject to Revocation.

By section 2280 of the Civil Code of California it is provided:

> "SEC. 2280. A trust cannot be revoked by the truster after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the truster, and in that case, the power must be strictly pursued."

This provision has been the subject of judicial decisions, and it has been universally held that after the creation of a trust the grantor has no power to revoke the trust unless the power to do so is reserved therein.

Hellman vs. McWilliams, 70 Cal., 449; 11 Pac., 659;
Nichols vs. Emery, 109 Cal., 323; 41 Pac., 1089;
People vs. Cogswell, 113 Cal., 129; 45 Pac., 270;
Booth vs. Oakland Bank of Savings, 122 Cal., 19; 54 Pac., 370;
Copp vs. Gunther, 95 Cal. 63; 30 Pac., 301.

It is not necessary that the beneficiary should either know of the trust or accept it. "The mutual consent of a truster and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission" (Civil Code, sec. 2251; *Booth vs. Oakland Bank of Savings*, 122 Cal., 119; 54 Pac., 370). The trust being obviously for the benefit of the beneficiaries, and imposing no burden whatever on them, is presumptively accepted by them (39 *Cyc.*, 79).

Under these circumstances we were naturally greatly surprised at the decision of the majority of the court in this case that this deed of trust could be revoked by the grantor, and still that is the very essence of the decision which has been rendered. If Henry Miller had gone into a court of equity to recover the property which he had transferred or to enforce an attempted revocation of the deed, he would have received no assistance, but would have met the same fate that the grantor met in *Gray vs. Union Trust Company*, 171 Cal., 637; *People vs. Cogswell*, 113 Cal., 129, and other cases which have been cited.

Under the General Law of Trusts the Deed Was Not Revocable.

As is stated in the dissenting opinion of Coleman, J., in the cases at bar:

> "Not having reserved the right to revoke the trust, such revocation was impossible, as shown in the case of *Nichols vs. Emery, supra*, which rule is sustained by the overwhelming weight of authority (see 1 Perry on Trusts, 6th ed., sec. 104; 39 Cyc., 92)."

III.

THE ACT OF THE STATE OF NEVADA, HAVING BEEN PASSED BEFORE THE TRANSFER, BUT HAVING EXPRESSLY PROVIDED THAT IT SHOULD NOT GO INTO EFFECT UNTIL A DATE AFTER THE TRANSFER, HAS NO EFFECT ON THE TRANSFER AND CANNOT BE LOOKED TO AS A RULE OF CONDUCT GOVERNING THE PARTIES TO THE TRANSFER.

We have already shown that the courts have passed upon this identical question with regard to Transfer Tax acts which were passed before the transfer, but did not go into effect until after the transfer, and it was held that such acts had no effect whatever upon such transfer.

Estate of Felton (1917), 176 Cal., 663; 169 Pac., 392;
Hunt vs. Wicht (1917), 174 Cal., 205; 162 Pac., 239.

In the first of those cases the Inheritance Tax Act was passed on April 7, 1911; the transfer was made on April 21, 1911, and the act, according to its provisions, did not go into effect until July 1, 1911; and it was held that, although the grantor reserved a life estate in the income and died at a date after the act went into effect, it could not apply to the transfer.

In the second case, the act was passed March 20, 1905; the transfer was made April 12, 1905, and the act went into force on July 1, 1905, and it was held that it could have no effect upon the transfer. This rule, however, is a general principle of law, and it is generally held that transactions

taking place between the passage and approval of an act are in no way affected thereby.

Whartman vs. Philadelphia, 33 Pa. St., 202.

Price vs. Hopkins, 13 Mich., 318.

Denert vs. Purdy, 29 Pa. St., 113.

Burn vs. Carvallo, 1 A. & E., 833; 28 E. C. H., 408; 4 N. & M., 889; 30 E. C. L., 622.

IV.

THE DECISION OF THE SUPREME COURT OF NEVADA IS CONTRARY TO THE DECISION WITH RESPECT TO THE SAME TRANSFER BY THE SUPREME COURT OF CALIFORNIA WHERE THE PARTIES RESIDE AND THE TRANSFER WAS MADE.

We have already pointed out that the Supreme Court of California has in three cases held that it is beyond the power of the legislature to impose a transfer tax on a past transfer (*See Hunt vs. Wicht, Estate of Felton*, and *Estate of Gurnsey, supra.*) But the same court has decided the same thing with respect to the identical transfer involved in the case at bar. That transfer first came before the court in the case of

Nickel vs. State of California (1918), 179 Cal., 126; 175 Pac., 641.

That was an action brought by the trustees under the same deed of trust to quiet title to the same against the claim of the State of California to a transfer tax under the acts of 1913 and 1915, both of which were passed after the execution of the deed in question. At the time of the transfer there

was another act passed in 1911, but the acts of 1913 and 1915 doubled the amount of the tax. The trial court sustained a demurrer to the complaint and held that the act of 1915, which was in effect at the time of the death of the grantor, was the act controlling the transfer. The supreme court reversed this decision on several grounds, among others that the acts of 1913 and 1915 could not constitutionally apply. The court thus expressed its conclusion on this subject:

> "The law in force at the time of the transfer as alleged was the inheritance tax law of 1911, and that statute controls in determining whether or not there is a tax upon the transfer and the amount thereof. (*Hunt vs. Wicht*, 174 Cal., 205 [L. R. A., 1917 C, 961; 162 Pac., 639]; *Estate of Felton*, 176 Cal., 663 [169 Pac., 329]; *Estate of Gurnsey*, 177 Cal., 211 [170 Pac., 402].)"

This was therefore a direct decision that the deed of trust operated as such on its date and was not subject to a transfer tax imposed by a subsequent act.

The trial court so construed the decision, and on the trial of the case made findings and a decree, the relevant portions of which are contained in an appendix hereto. The court, among other things, found:

> "That the said deed of trust took effect immediately upon its execution and delivery and was intended by the said Henry Miller to take effect immediately upon its execution and delivery and the said trustees immediately became the owners of legal title of the said shares of stock, and the beneficiaries immediately became the owners of the equitable title thereto, and

> the estates created thereby immediately became vested property rights of the said trustees and beneficiaries * * * that said Henry Miller did not reserve any power or right to revoke the said deed of trust, and the same was in law irrevocable; * * * that the said transfer was not a gift *causa mortis*, but was a gift *inter vivos*, and the said deed of trust was not testamentary in character; * * *
>
> "That the said transfer is not subject to any lien or claim for any inheritance or transfer tax under any other act of the legislature of the State of California nor under any act of the State of California passed or going into effect after the date of the said transfer and the said transfer is not subject to any lien or claim for any inheritance or transfer tax under the certain act of the legislature of the State of California * * * approved June 16, 1913.
>
> "Nor is the said transfer subject to any lien or claim for an inheritance or transfer tax under the certain act of the legislature of the State of California * * * approved May 10, 1915."

The court also quieted the title of the trustees *under the deed of trust* to the stock as against the claims of the State of California to any transfer tax under either of the acts in question.

This judgment was reviewed by the Supreme Court of California in *Estate of Miller*, decided January 18, 1921, — Pac., —, as to certain matters not material to this case and was affirmed. Among other things, the court said:

> "It is the settled law of this State, as well as in other jurisdictions, that when a transfer is made *inter vivos* its liability for tax is determined by the law then in effect, even though the tax be not payable

until the death of the transferrer. (*Hunt vs. Wicht*, 174 Cal., 205; *Estate of Felton*, 176 Cal., 63; *Nickel vs. State*, 179 Cal., 126.)"

It should be noted that although the State of California failed, by reason of these decisions, to collect some two million dollars claimed by it, it did not rely on any of the grounds relied upon by the State of Nevada as to the testamentary character of the transfer or the revocability thereof, or if they were relied upon they were not deemed of sufficient merit to even justify the court in referring to them in its opinions.

V.

THIS COURT IS NOT BARRED FROM PROTECTING LITIGANTS WITH RESPECT TO CONSTITUTIONAL RIGHTS INVOKED BY THEM BY REASON OF ANY FAILURE OF THE STATE COURT TO EXPRESSLY PASS ON THE CONSTITUTIONAL QUESTION, AND WHEN THE DECISION OF THE STATE COURT IS ATTEMPTED TO BE PLACED ON NON-FEDERAL GROUNDS, THIS COURT MAY ITSELF DETERMINE WHETHER THERE IS ANY FAIR AND SUBSTANTIAL SUPPORT FOR THE NON-FEDERAL GROUNDS PUT FORWARD, AND IF THEY ARE PLAINLY UNTENABLE MAY DISREGARD THEM AND DEEM THE CONSTITUTIONAL RIGHT DENIED IN SUBSTANCE AND EFFECT.

This rule is so well settled that it will suffice to merely cite the cases in which it has been laid down and applied by the court.

Union Pacific R. R. Co. vs. Public Service Com., 248 U. S., 67;

Leathe vs. Thomas, 207 U. S., 93, 99;
Vandalion R. R. Co. vs. South Bend, 207 U. S., 359, 367;
Gaar, Scott & Co. vs. Shannon, 223 U. S., 468;
Creswill vs. Knights of Pythias, 225 U. S., 246, 261;
Enterprise Irrigation District vs. Farmers Mutual Canal Co., 243 U. S., 157, 164;
Jefferson Branch Bank vs. Skelly, 1 Black, 436, 443;
Huntington vs. Attrill, 146 U. S., 657, 683-4;
Boyd vs. Thayer, 143 U. S., 135, 180;
Carter vs. Texas, 177 U. S., 442, 447;
Terre Haute & Indianapolis R. R. Co. vs. Indiana, 194 U. S., 519, 589;
Ward vs. Love County, 253 U. S., —; decided April 25, 1920.

Where a party claims that to impose a certain burden would deprive him of rights, privileges, or immunities secured by the Federal Constitution, a State court cannot prevent a review by failing to pass upon the validity of that claim of right or immunity under the Constitution. In such a case as this, the case cannot be decided without passing upon the validity of the right, privilege, or immunity invoked under the Federal Constitution, and in such case the decision can be reviewed whether or not the Federal question was passed upon by the State court.

Chicago, B. & Q. Ry. vs. Illinois, 200 U. S., 561; 50 L. Ed., 596.
West Chicago Street Railroad Co. vs. Illinois, 201 U.S., 506; 50 L. Ed., 845.
Roby vs. Colehour, 146 U. S., 153; 36 L. Ed., 922.
St. Louis, I. M. & S. R. Co. vs. Starbird, 243 U. S., 592; 61 L. Ed., 917.
Corn Products Refining Co. vs. Eddy, No. 13, U. S. Sup. Court Adv. Op., 398 (1918-19).

Standard Oil Co. vs. Graves, No. 13, U. S. Sup. Ct. Adv. Op., 412 (1918-19).

Postal Telegraph-Cable Co. vs. City of Newport, 247 U. S., 464; 62 L. Ed., 1215.

Citizens Bank of Los Angeles vs. Parker, 192 U. S., 73; 48 L. Ed., 346.

Atty. General of Michigan vs. Lowrey, 199 U. S., 233; 50 L. Ed., 167.

Myles Salt Co. vs. Board of Commissioners, 239 U. S., 478; 60 L. Ed., 392.

See, also, cases reviewed in dissenting opinion of Day, J., in *Hodden Land & L. S. Co. vs. Interstate Trading Co.,* 233 U. S., 536; 58 L. Ed., 1083.

The above decisions are not by any means exhaustive of this subject, and merely indicate this line of authority. The following excerpts from the opinions of this court in these cases sufficiently indicate the rule:

> "Undoubtedly, the general rule is that where the judgment of the State court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues and control the rights of the parties, however the Federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question. But it is equally well settled that the failure of the State court to pass on the Federal right or immunity specially set up, of record, is not conclusive, but this court will decide the Federal question if the necessary effect of the judgment is to deny a Federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting

upon some ground of a local or general law. * * * Therefore, a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company, and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of local or general law, then the claim of a Federal right would become immaterial, and we could not have re-examined the judgment. But the decision was otherwise, and was, in law, a denial of the claim of a Federal right." Harlan, J., in *Chicago, B. & Q. Ry. vs. Illinois, supra.*

"The contention of the city that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the State court rests partly upon grounds of local or general law. But, by its necessary operation—although the opinion of the State court does not expressly refer to the Constitution of the United States—the judgment rejects the claim of the company, specially set up in its answer, that the relief asked by the city cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the State from depriving any one of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error, for the Federal questions raised cover the whole case, and are of such a

nature that the rights of the parties could not be finally determined without deciding them. As the judgment, by its necessary operation, denied the company's claims based on the Constitution of the United States, this court has jurisdiction to inquire whether those claims are sustained by that instrument." Harlan, J., in *West Chicago Street Ry. Co. vs. Illinois, supra.*

"The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the State law by the State court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the State." (Citing numerous decisions.) Pitney, J., in *Corn Products Refining Co. vs. Eddy, supra.*

"While this court follows the decisions of the highest court of a State, as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void." Day, J., in *Standard Oil Co. vs. Graves, supra.*

The matters passed upon by the Supreme Court of Nevada are all matters of general jurisprudence and not matters of local law, and this court is not bound thereby.

So far as the construction of the act in question is concerned the decision of the Supreme Court of the State is in our favor and is distinctly to the effect that if the instrument in question operated as a deed and created vested rights and estates at its date, it would not be taxable under the act. The only other questions decided were as to the operation

of the instrument, whether it was testamentary in character and whether it was subject to revocation. It is not claimed that there is any special statute of Nevada on any of these matters, and they are therefore clearly questions of general jurisprudence, the decision of which by the State court is not binding on this court.

See note to *Faugpaugh vs. Delaware, etc., Co.*, 5 L. R. A., 508.

In determining the jurisdiction of this court on writ of error the court is not concerned with the act as it is written or even with the act as it is expressly construed, but it is concerned only with the act as it is enforced and applied by the State courts.

Myles Salt Co. vs. Board of Commissioners, 239 U. S. 478; 60 L. Ed., 392.

Jett Bros. Distilling Co. vs. Carollton, — U. S., —; decided March 1, 1920.

It is immaterial whether plaintiffs in error have been deprived of their property by a law which has been given a retroactive operation, or have been deprived of their property without any authority of law.

If the Supreme Court of Nevada has expressly given a retroactive construction to the law, and construed it as taxing a transfer made before it went into effect, we would have the exact condition prohibited by the decisions cited in Point I of this brief. The State court, however, decided that the act did not tax a transfer which passed the legal title to the property before it went into effect. If this instrument did pass the

legal title to the property and the parties are still held for the tax, they are so held without any act of the Legislature imposing such a burden. To impose a burden without any law, is certainly taking property without due process of law. By due process of law "undoubtedly a 'pre-existing rule of conduct' is intended, not 'an *ex post facto* rescript or decree made for the occasion'."

Cooley on Constitutional Limitations, 7th, Ed., p. 507.

By this provision of the Constitution vested rights are protected, and this includes the "title to future enjoyment of property" (Id., p. 511).

VI.

THIS CASE IS NOT GOVERNED BY DECISIONS APPLICABLE TO ESTATES CREATED BY THE EXERCISE OF POWERS OF APPOINTMENT CREATED BEFORE BUT EXERCISED AFTER THE PASSAGE OF THE INHERITANCE TAX ACT.

Certain cases have arisen where a power of appointment was created before the passage of an inheritance tax act and was exercised after that time, and the question has arisen as to whether or not it is permissible to impose a tax on the exercise of such a power. The decisions on this subject are not in harmony. The difference between them depends on the fundamental question of law as to whether a right under a power of appointment comes from the granting of the power, or from the exercise of the power. The courts which hold that the estate comes from the granting of the power hold it not to be subject to the tax under such circumstances,

and the courts which hold that the estate comes from the exercise of the power hold it to be subject to the tax under such circumstances. The following are cases of the latter class:

Crocker vs. Shaw, 174 Mass., 266;
Orr vs. Gilman, 183 U. S., 278;
Chanler vs. Kelsey, 205 U. S., 466.

In each of these cases the language of the court clearly shows that it was because the court held that the estate was created by the exercise of the power and not by the deed which granted the power that it was held subject to the tax. The majority of this court deemed that this was a question of local law and not a matter of general jurisprudence and therefore that this court was bound by the decision of the court of the State as to the origin of the estate. The authorities on this subject are reviewed by Mr. Delger Trowbridge, in volume 8 of the California Law Review, page 216. While the subject is an interesting one, it is clear that those cases have no application to the cases at bar, in which the estates clearly arise from the deed made before the law was in force.

VII.

IT IS UNNECESSARY TO CONSIDER HOW FAR THE LEGISLATURE MIGHT IMPOSE A TAX UPON THE COMING INTO POSSESSION OF AN ESTATE CREATED BEFORE THE PASSAGE OF THE ACT, BECAUSE THE ACT IN QUESTION ADMITTEDLY IMPOSES NO SUCH A TAX. IT IMPOSED A TAX ON THE "TRANSFER" AND NOT ON THE COMING INTO POSSESSION OF THE PROPERTY.

There are certain decisions which might be thought to hold that it would be permissible to treat the coming into possession of a vested estate as a taxable occasion. As we shall show that the Nevada act admittedly imposes a tax on the *transfer* and not upon the coming into possession of the estate, this matter is not important in this case. We shall, however, refer to the cases which are applicable to this phase of the general subject at least for the purpose of classifying them, in view of the fact that they may be referred to in the brief of the defendants in error.

The first case of this character is

Stevens vs. Bradford, 185 Mass., 439; 70 N. E., 425;

In that case a will was probated in 1899, creating a life estate with remainders, and the question involved was whether or not the remainders were presently taxable. This question arose by reason of the provision of the act of 1902 which postponed the time of payment of taxes on future interests until the party entitled thereto should come into the actual possession of the property. The act in referring to such future estates used the words "has been," and the court therefore held that it was intended to apply to such estates which had been theretofore created, as well as to estates thereafter created, and such clearly was the legislative intention. Of course, in that case no question was involved as to the validity of retroactive legislation since the act was entirely in favor of the party taxed, as it merely extended the time for the payment of the tax, and in fact the act was relied upon by him against the State.

The next case of this nature is the English case of

Attorney General vs. Lord Middleton, 3 Hurl. & N., 125:

This case arose under the act imposing what is known as the English Succession Duty. That act imposed a tax on every "succession" and then proceeded to define a "succession" as "Every *past* or future disposition of property, by reason whereof any person *has* or shall become beneficially entitled to any property," etc. The act was expressly made applicable to past transactions, and it was accordingly held that it was intended that a remainderman coming into possession after the passage of the act was taxable thereunder, that being a "succession" under the act. Of course that being an English case no question of the validity of the legislation thus construed was involved.

The next case of this character is

Wright vs. Blakeslee, 101 U. S., 174; 25 L. Ed., 1048:

This case arose under the Succession Tax Act of 1864, which was copied almost word for word from the English Succession Duty Act above referred to. Section 13 of the act contained the following provision:

> "That every *past* or future disposition of real estate by will, deed or laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy, to any real estate or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer on the person entitled by reason of any such disposition a 'succession'; and the term 'successor' shall denote the person so entitled, and the term 'predecessor' shall denote the grantor, testator, administrator or other

person from whom the interest of the successor *has been* or shall be derived."

This court held that the act was expressly made retroactive for the reason that it expressly applied to every *past* disposition of property, and was therefore applicable to past dispositions of property coming into actual possession after the passage of the act. No question was raised as to the validity of such a tax.

The next class of cases of this kind is composed of cases imposing taxes on pending estates in probate, such as

State vs. Furnell, 20 Mont., 299; 51 Pac., 267, and
In re Short's Estate, 16 Pa. St., 66, affirmed in
Carpenter vs. Commonwealth, 17 How., 456.

We shall review those cases elsewhere and show that they are based on the theory that since the estate is subject to administration, it was the duty of the State to conserve the estate, and therefore that the acual receiving of the estate was a taxable privilege.

That this was the ground upon which these cases proceed is made clear by the decision in *Cahen vs. Brewster* (1906), 203 U. S., 543, 51 L. Ed., 310. This case was heard on writ of error to review the decision in *Succession of Levy* (1905), 115 La., 377; 39 So., 37. In that case the Legislature of Louisiana had passed an inheritance tax applicable to estates in course of administration, and the court held that as the machinery of the law of probate administration was necessary to pass the succession, it was appropriate to levy a tax while the machinery of the law was in process of utilization. In passing on the contention that this dis-

criminated between estates which were in process of administration and estates which had been closed, this court said:

> "But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, 'until it had passed out of the succession of the testator.' It was certainly not improper classification to make the tax depend *upon a fact without which it would have been invalid*. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws *because those who cannot be taxed are not taxed*."

The same matter is made still more clear by the decision in *Succession of Stauffer* (1907), 119 La., 66; 43 So., 928, in which the State claimed a tax under the act with respect to certain parts of the estate which had been distributed before the act was passed. The court held that no tax could be exacted on such property, saying:

> "Where the heir's seisin in right has merged into seisin in fact, the right so vested cannot be divested without a violation of the constitutional prohibition contained in article 166."

The same thing was held in *Herriott vs. Potter* (1902), 115 La., 648, 89 N. W., 91. There it was sought to apply the act to real estate, the possession of which went to the heir and not to the administrator before the passage of the act. In holding that this could not be done, the court said:

"The inheritance tax is not levied on property, but depends wholly on the collateral heir taking property. It is on the right to succeed to ownership, and after this has passed to the heirs the estate has fallen out of the class at which the particular tax is aimed, and becomes subject to that rule of equal taxation, guaranteed to all property of like character. *If a tax on succession, the amount of which cannot be ascertained, may relate back one year, so as to compel payment by those who have acquired property by inheritance within that time, then it may stretch back over a period of 20 or any number of years, and the citizen never know with any degree of certainty what burdens are to be imposed.*"

It will be noted that these decisions use language very similar to the language used by Mr. Justice Holmes in his dissenting opinion (not contrary to the decision of the majority of the court in this particular) in *Chanler vs. Kelsey* (1907), 205 U. S., 466:

"Such a tax cannot be levied except where there is a succession, and when some element or step necessary to complete it still is wanting when the tax law goes into effect. If some element is wanting at that time, the succession depends, for taking effect, on the continuance of the permission to succeed or grant of the right on the part of the State, and, as the grant may be withdrawn, it may be qualified by a tax. But if there is no succession, or if the succession has fully vested, or has passed beyond dependence upon the continuing of the State's permission or grant, an attempt to levy a tax under the power to regulate succession would be an attempt to appropriate property in a way which the 14th Amendment

has been construed to forbid. No matter what other taxes might be levied, a succession tax could not be, and so it has been decided in New York. *Re* Fell, 171 N. Y., 48, 55; 57 L. R. A., 540; 89 Am. St. Rep., 791; 63 N. E., 789; *Re* Seaman, 147 N. Y., 69; 41 N. E., 401."

Another case requiring special consideration is

Carter vs. Bugbee (1919), 92 N. J. L., 380; 106 Atl., 413.

In that case the deed was to certain persons "if he (or she) shall survive the settler." It was held that under the law of New Jersey such a deed did not transfer title until the happening of the event, namely, the survival of the beneficiary, which happened after the passage of the act. The court said:

"The argument in the Supreme Court was along the same lines as that now made before us, and the tribunal reached the conclusion that the transfer contemplated by the statute was the actual tradition of the property to the beneficiaries, and that as this did not occur until the death of the settler, it was subject to the tax imposed by the statute then in force; in other words, that it was the legislative purpose to assess the tax when the property came into the actual possession and enjoyment of the beneficiaries, without regard to whether the interests created by the trust deed vested at the time of its execution and delivery or were contingent upon the happening of some future event subsequent to the enactment of the statute. *There is much force in the contention of counsel for the appellants that when the trust deed*

> *passes to the beneficiaries a present vested interest in the subject of the trust, a transfer tax cannot be imposed upon it by virtue of legislation which has subsequently been enacted. It has been so held by the Court of Appeals of New York in the Matter of Pell*, 171 N. Y., 48, and subsequently in the *Matter of Lansing*, 182 *id.*, 238. We do not consider, however, that the determination of the case now before us requires us to pass upon the soundness of the contention, for under the true construction of the trust deed, it is not involved."

After stating the law of New Jersey as to deeds of this character, the court said:

> "Until that event occurred, therefore, there could be no transfer of the *title* to the estate in remainder, because not until then could the parties entitled to receive the gift be ascertained.
>
> "The narrow question, therefore, now to be decided, as it seems to us, is whether a transfer tax can be legitimately imposed by the Legislature upon property which has been made the subject of a deed of trust executed and delivered before the enactment of the statute, *when such deed does not operate to transfer title to such property until after the tax act comes into being.*"

We do not need to consider the validity of the premise of the court that title did not pass, but assuming that title did not pass the conclusion may be sound. It seems to us, however, that the court confused the passing of title, and the creation of a vested as distinguished from a contingent estate.

The last case of this kind is the case of

Moffitt vs. Kelly, 218 U. S., 400:

In this case the Supreme Court of California held that the interest of the wife in the community property was a mere expectancy like that of an heir apparent and that she took her share of the community property as heir of the husband and that therefore her share was subject to an inheritance tax. This court deemed that to be a decision as to a matter of local law and therefore affirmed the judgment. In doing so, however, the court made some remarks about the distinction between taxing a right and taxing a privilege, from which it might be argued that the right to come into possession of an existing estate might be the subject of some character of taxation. It is not necessary to consider that contention, because the Navada act does not purport to tax the coming into possession of vested estates, but on the contrary the Supreme Court of Nevada has held that that act does not impose that kind of a tax. That court had occasion to consider whether the interest of the wife in the community property was taxable when she came into possession of it upon the death of the husband in the case of

Estate of Williams, 40 Nev., 239; 161 Pac., 741.

In that case the Supreme Court of Nevada fixed the construction of the act in question as taxing a privilege and not as taxing a right. It refers to the fact that the act fixing the rights of the wife in the community property was "passed long prior to the time at which any inheritance tax law was considered in this State," and refers to the claim of the State that the community interest of the wife only vested after the death of the husband and states that "This would lead to the conclusion that prior to the dissolution of the community the wife was not in any wise vested with an

part of the community property," and finally states the matter as follows:

> "It is not necessary to dwell on this principle here, because viewing the matter as we do in the light of the great weight of authority, and especially under statutes providing for the community system, there is no taking property from another, either by will or legal devolution. The property going to the appellant was property which she at all times under our statutory provisions held in common with her husband. *Hence there was no privilege to be taxed, but rather a right in property recognized by statutory prescription held by her at all 'times in common with her husband.'* The death of the husband only dissolved the community and released that which she held from the statutory dominance of the deceased spouse."

This is a clear construction of the act as not taxing the mere coming into possession of property under a pre-existing right, but as taxing the creating of a right to property.

The Supreme Court of Nevada was careful to adhere to this construction of the act in the cases at bar. In its first opinion it approved the opinion of the trial judge, which it quoted to this effect:

> "It will be noted that the statute went into effect April 25, 1913, and is not by its terms made retroactive. Hence, it must be construed as having only a prospective operation, as no intent to make the same operate retrospectively may be inferred from the words therein employed; *therefore, if the interests in the property mentioned in the deed passed to and vested absolutely in the beneficiaries therein named*

> *upon the date of the execution and delivery of the deed and independently of the death of Henry Miller, no tax may lawfully be imposed thereon.*"

The court then proceeded to point out that "In this situation the vital point raised is, did the deed of trust as of its date create a vested estate so as to exempt the transfer from the operation of the statute?" Further on it refers to its decision in *In re Williams*, 40 Nev., 239, and states "there is a marked difference in 'taxing a right and taxing a privilege.'" This the court made even more clear by its opinion on rehearing in which it stated:

> "We concede that if upon any reasonable hypothesis we could bring ourselves to the conclusion that as a matter of law the title to the specific shares of stock vested absolutely in the trustees before the act became effective the motive of the grantor for making the deed would be immaterial."

So it is clear that the Nevada court not only has not construed the act as imposing a tax upon the coming into possession of property previously transferred, but has expressly decided that no such tax is imposed. And this is clear from the act itself, which only imposed a tax on "the *transfer* of all property." This is the general language of practically all the inheritance-tax laws of the States from which we have cited decisions, and in all of them the acts have been construed as imposing the tax upon the *transfer* and not on the coming into possession and enjoyment, and all of them hold both as a matter of construction and as a matter of constitutional power that if the *transfer* takes place before the act there is no tax, although possession takes place after the act.

(See cases cited under Point I, *supra*.)

For these reasons the court should not consider the question as to the power to tax the coming into possession of vested estates. That would raise the question whether such a tax was a direct or an indirect tax, a matter very important in Federal taxation, and would raise the question of the power of Congress to levy such a tax under the constitutional principles pointed out in Point I, *supra*, a matter not considered in *Wright vs. Blakeslee*, *supra*.

This court in effect decided that such a tax as the one in the cases at bar is on the "transfer" and not on the coming into possession, in

Keeney vs. New York, 222 U. S., 525; 56 L. Ed., 299.

In that case the court upheld the constitutionality of a tax on transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death, and the court had occasion to pass upon the nature of such a tax. Counsel contended that the law "does not in effect provide for a tax upon 'a transfer' of property, but upon the coming into 'possession' of property previously transferred." But this court held that it was an excise or transfer tax and that

> "an excise on transfers, therefore, does not lose that character because the amount to be paid is determined by the values conveyed. * * * We therefore accept the conclusion of the court of appeals of New York that the statute of that State imposing a tax on transfers of property 'intended to take effect in possession or enjoyment at or after the death of the grantor' is 'not a property tax, but in the nature of an excise tax *on the transfer* of property.'"

This court further enforced the rule that the tax was on the transfer and not on the coming into possession by holding that its taxability must depend on conditions which existed at the date of the transfer and not at the death of the grantor. In that case the property was within the jurisdiction of the taxing State when the transfer was made, but not at the date of the death of the grantor and the coming into possession. In holding that this was immaterial, the court said:

> "But the statute does not impose a tax on the property, but *on the transfer*. The validity of that burden must be determined by the situation as it existed in 1903, *when the deed was made*. At that time the grantor was a resident of the State of New York. This personal property there had its *situs*. She there made a *transfer, which was taxable*, regardless of the residence of the trustee or beneficiary. The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. But where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that *the liability was imposed when the transfer was made, in 1903*, and that payment was not required until the death of grantor, in 1907, does not present any Federal question."

It may seem useless to argue a matter on principle which is thus so clearly set at rest. But we would add that the tax is determined by the nature of the transfer and not by the time that the estate transferred vests in possession. Gifts "in contemplation of death" are taxed because they are of that character. They may or may not vest immediately in possession

or enjoyment. Still they are taxed. Gifts intended to take effect in possession or enjoyment at or after death are taxed because they are transfers of that character. Even if they never in fact vest in possession or enjoyment, they are still taxed (*Estate of Hite,* 159 Cal., 392).

In case of an estate in remainder it might not vest in possession and enjoyment until long after the death of the grantor; still the tax would be fixed at the time of the transfer and become due upon the death of the grantor, which shows that the event which is the occasion of the tax is not the coming into possession or enjoyment of the property, but the making of the transfer of the particular character mentioned in the act.

In fact in the case at bar the State court has assessed the tax on estates in remainder to which the grandchildren and great-grandchildren of the grantor shall become entitled in possession or enjoyment after the death of their parents or parents and grandparents, respectively (page 617). *This is a conclusive determination that the tax is on the transfer and not upon the coming into the possession or enjoyment of the property.*

VIII.

Review of Opinion of the Trial Judge.

The trial judge filed a written opinion (pages 575-585) in which many authorities are cited, but an examination of them will show that none of them are contrary to the cases relied upon by us. Those decisions are as follows:

New England Trust Co. vs. Abbott, 205 Mass., 279.

This case did not involve a transfer at all made before the passage of the inheritance-tax law. The transfer was made in 1893, but the first inheritance-tax law in Massachusetts was passed in 1891 (Stats., 1891, chapter 425). In that case a party made a deposit of certain sums with a direction to pay the income to a certain person, and providing that at the expiration of five years he could withdraw the trust fund; if not withdrawn, it should continue for another five years with the like right to withdraw it at the end of that period. It was further provided that in case of the death of the transferror the fund was to go to the same party in sixty days after the expiration of the period of five years. The question was whether or not the interest in the *corpus* of the property vested in possession or enjoyment prior to the death of the decedent. It was held that the principal did not vest in possession or enjoyment until that event, for the reason that the trustor had a right to withdraw it at any time, but that the income did vest in possession or enjoyment at once. No point was made as to the fact that the transfer was made before the passage of the inheritance-tax act, and in fact the transfer was made after the passage of the inheritance-tax act of 1891, and it was a clear case of a transfer to take effect in possession or enjoyment after the death of the grantor so far as the principal was concerned. So far as the income was concerned, that was payable during the life of the donor, and therefore it was held that it was not taxable, but that the tax would begin at the time the principal was turned over to the beneficiary.

Matter of Brandreth, 169 N. Y., 437:

This case simply held that an interest in remainder became effective in possession and enjoyment after the death of the decedent, who reserved a life estate therein. In that case the transfer was made in 1893, and the inheritance-tax act was passed in 1892 (Stats., 1892, chapter 399). The point was therefore not involved, and not referred to, as to what would be the effect if the transfer had been made before the passage of that act.

Matter of Green, 47 N. E., 292:

This case presented the same situation, the transfer having been made in 1893, and the act having been passed in 1892 (Stats., 1892, chapter 399).

In re Moir's Estate, 69 N. E., 905 (Ill.):

This case presented the same proposition and the point was not involved as to what the result would be if the transfer had been made before the act went into effect. The transfer was made in 1898 and the inheritance-tax act was passed in 1895 (Hurd's Rev. Stats., 1899, p. 1460).

Cornell's Estate, 63 N. E., 445 (N. Y.):

This case presented the same situation, the transfer having been made in 1896 and 1897 and the inheritance-tax law having been passed in 1892 (Stats., 1892, chapter 399).

In re Cruger, 66 N. Y. Suppl., 636:

This case presented the same situation, the transfer having been made September 13, 1892, and the inheritance-tax statute being in force at that time (Laws of 1892, chapter 399).

People vs. Kelley, 75 N. E., 1038 (Ill.):

This case presented the same situation, the transfer having been made in 1900 and the inheritance-tax law having been passed in 1895.

Estate of Keeney, 87 N. E., 428 (N. Y.):

This case presented the same situation, the transfer having been made in 1903 and the inheritance-tax law enacted in 1892.

Attorney General vs. Stone, 95 N. E., 395:

In this case the transfer was made by will in 1893, and was therefore covered by the inheritance-tax act of 1891. It appeared, however, that in 1902 an amended inheritance-tax act was passed which, by its express terms, was made both retroactive and prospective, but it made no changes in the amount of the tax or the property or transfer subject to the tax, but simply made certain changes in form and it was held that it did not, therefore, violate any vested rights, and that it was therefore constitutional. The decision of the court clearly pointed out that no additional burdens were imposed by that act, and it is clear from the decision that it was conceded that if additional burdens were imposed it would be unconstitutional, and no question was involved as to a transfer made before the passage of the act imposing the tax.

Appeal of Seibert, 110 Pa. St., 329:

This was a case involving a transfer made in 1882, long after the passage of the inheritance-tax law, which was passed in 1826.

Keith vs. Commonwealth, 106 Pa. St., 521:

This involved a transfer made in 1878, long after the passage of the inheritance-tax act of 1826.

Moffitt vs. Kelly, 218 U. S., 400:

This case is reviewed under Point VII, *supra*.

Lamb's Estate vs. Morrow, 117 N. W., 1118 (Iowa):

This case involved a transfer made in 1900, whereas the inheritance-tax act was passed in 1898 (acts of 27th General Assembly, 1898, chapter 37).

In Hoyt's Estate, 149 N. Y. Suppl., 91:

This involved a transfer made long after the passage of the inheritance-tax act, and the only question was as to whether or not it was a transfer made in contemplation of death or to take effect in possession or enjoyment after death, and it was held that since a power of revocation was reserved that made it a transfer in contemplation of death, or intended to take effect in possession and enjoyment after death.

Matter of Bostwick, 160 N. Y., 489:

The transfers involved in this case were made in 1892 and 1896, and the inheritance-tax act was passed in 1892. The exact dates of the transfers are not shown, but no point was made that they were executed before the act was passed. By the deed the grantor reserved the power: 1, to direct the payment of the income to himself during his life; 2,

to direct the payment of the income to other persons than the beneficiaries as he might designate in writing; 3, to withdraw the securities constituting the trust fund and to substitute others; 4, to alter or amend the trust and to add property thereto; 5, to terminate the trust at any time during his life. It was therefore held that the same was not a present gift, but a gift intended to take effect in possession and enjoyment on death.

Gannon vs. McIntyre, 160 N. Y., 476:

This case does not involve a tax matter at all, but merely the validity of a gift *causa mortis*, and the particular gift there involved was held to be good.

Re Schermerhorn's Estate, 149 N. Y. Suppl., 95:

This case is of the same character as *Re* Hoyt's estate. The transfer was made after the passage of the inheritance-tax act, but contained a power of revocation. It was held that this made it a transfer to take effect in possession and enjoyment upon death within the meaning of the act.

Equitable Trust Co. vs. Kelsey, 95 N. E., 851:

This case involved a transfer made long after the passage of the inheritance-tax act. It was held that it clearly appeared from the instrument that the beneficiaries were not to receive the property until after death; therefore that it was taxable.

Minot vs. Winthrop, 162 Mass., 113:

This case merely holds inheritance-tax laws to be constitutional, and in no way involved transfers made before the passage of the law.

Emerson et. Shaw, 50 N. E., 1033.

This case merely involved the question as to whether the donor or donee of a power of appointment is the decedent in determining the relationship of the parties. It does not seem to have anything to do with the matter in hand.

State ex. Mellier (Kans.), 152 Pac., 771.

In this case it appeared that many years before the decedent's death he had made a contract by which he had agreed to make a will in favor of a certain person if she would take care of him as long as he lived. This contract was made prior to the passage of the inheritance-tax law, but he afterwards died leaving a will by which he did leave the party his property. It was contended by the legatee that her rights were under the contract and not under the will, and that therefore they could not be subject to the inheritance-tax law passed thereafter. The whole decision practically concedes that rights which were vested prior to the passage of the inheritance-tax law would not be subject thereto, but it was held that the contract which she made was merely that he was to will the property to her, and that she therefore contracted with knowledge of the fact that his right to make a will was subject to the control of the law, and she got no greater vested right to receive the property by will than he had to dispose of it by will, and the legislature having thereafter put a condition upon his right to dispose of his property by will, she must receive the property subject to the same condition, and, for this reason, it was held that no vested right was in any way interfered with. The whole decision in fact presupposes

that if she had taken her rights by the agreement without the operation of the will at all, they would not have been subject to this tax.

Matter of Seaman, 147 N. Y., 69:

There is language in this case that might be construed to permit the legislature to tax all transfers made prior to the passage of the inheritance-tax law, but the question was not in fact involved in that case, and such a statute was held unconstitutional in *Re Pell* 171 N. Y., 48, and many other New York cases cited under point I, *supra;* and as was said in *Craig's estate*, 89 N. Y. Suppl., 972:

> "It is true that something is said (in the Seaman case), which may seem to be in conflict with the view I am taking, but I am sure there is nothing in the actual decision to that effect."

The court also pointed out that the constitutionality of an inheritance-tax act if applied to a previous transfer was not involved in the Seaman case, but was directly involved in the Pell case, and it was there held to be unconstitutional if applied to a transfer made before its passage.

It will therefore be seen that none of these cases involves a transfer made prior to the taking effect of the inheritance-tax statute, whereas all the cases which have involved such transfers have held, first, that inheritance-tax statutes were not intended to apply thereto, although the transfer was made either in contemplation of death or intended to take effect in possession or enjoyment after death, and, secondly, that if they were intended to have such effect they would be unconstitutional.

Provision of Deed as to Payment of Beneficiaries.

The principal reliance of the trial judge was on the provision of the deed that in case any of the sums directed to be paid by the deed were received under the will of the grantor, this should be deemed a satisfaction and the trustees should hold the property on the other trusts in the deed contained. It is not clear to what extent the Supreme Court followed his views on that subject, and we shall therefore carefully consider it. The learned trial judge held that the transfer created no vested right; that the transfer was testamentary and subject to revocation by the grantor. The ground upon which he reached this conclusion is stated in his opinion as follows: After referring to the fact that Henry Miller had also made a will by which he devised his estate on the same trusts upon which he transferred this stock by this deed of trust, the learned judge said:

> "The will contains substantially the same provisions as the deed of trust and expressly directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified which are the same as specified in the deed, paragraph III of which contains the following provision:
>
> "'If any person to whom any sum of money is directed to be paid dies before the death of said party of the first part, such provision shall lapse except as otherwise provided herein. If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament of said party of the first part from any estate coming into their possession

under said will, such payment shall be deemed to be in satisfaction of the provisions herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein.'

"It is manifest that Henry Miller did not completely divest himself of or relinquish control over the interests of the individual beneficiaries named in the instruments. Up to the time of his death he still retained and possessed the lawful right to effectively destroy, or at least, to render practically valueless, the interests of each of the individuals named as beneficiaries in said deed of trust. In order to attain this result it was only necessary for him to make another will revoking all former wills by him made, and, by appropriate testamentary language direct his trustees therein named to pay the individual beneficiaries specified in said deed of trust one dollar or one cent, or any other nominal sum in satisfaction of the provisions contained in said deed, whereupon 'such payment shall be deemed to be in satisfaction of the provision herein made for such party.' The fact that he did not do so is immaterial. Whether the persons named would come into the possession or enjoyment of any tangible interest or property of value depended entirely upon the situation existing at the time of the death of Miller and not at the time of the execution and delivery of his deed of trust. Their respective interests were not fixed or determined until that event occurred. Prior to the death of the settlor the interests of the beneficiaries were not capable of any reasonably approximate valuation because the deceased reserved the right to effectively amend the deed, not directly, but by a will subsequently executed as heretofore indicated, and this

reservation rendered the respective interests of the *cestui quis* of such uncertain quantum and value as to make them entirely dependent upon the will of the donor."

(Trans., fols. 1737-43.)

This language shows a total misconception of the legal effect of the language of the deed of trust relied upon. By reference to the deed of trust it will be seen that it transferred certain shares of stock to the trustees, authorized them to sell sufficient of it to pay certain sums, and then directed that the same should be paid to certain designated beneficiaries. The income of all the property was directed to be paid to certain designated persons during the term of the trust, and the *corpus* of the property was disposed of to certain persons. The grantor, however, also executed his will, which obviously could not operate on this stock, and by it provided that the same specific amounts should be paid to the same persons. It was obvious, however, that he did not want those sums paid twice, so he put in the deed of trust the following provision:

"If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside *in whole or in part* by any trustee named in the last will and testament of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provisions herein made for such party, and also in satisfaction of the provision in such will made for such party, *in whole or in part*, as the case may be, *and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein.*"

The learned trial judge says that the grantor could destroy the entire estate or interest of any or all of the beneficiaries under the deed by merely making a will giving them one cent. The answer to that is that he could do nothing of the kind. According to the terms of the deed of trust, if the named beneficiaries received through his will the sums directed to be paid them by the deed of trust, "in whole or in part," that should satisfy the direction of the deed of trust "*in whole or in part, as the case may be.*" One cent received under the will would not satisfy the provision for one thousand dollars under the deed. Nor would the mere making of a will giving one thousand dollars satisfy a direction in the deed to pay one thousand dollars. The provision could only operate when the sum was "paid" under the will. But suppose all these specific sums had been so paid, the result would be that the other beneficiaries—the residuary beneficiaries—would be enriched to that extent, for the deed of trust provides that in that event—

> "the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein."

The legal effect of the deed is therefore simply that these specific beneficiaries were by the deed absolutely guaranteed the sums of money directed to be paid to them, subject only to the condition that if they received the same amounts from another source, this should satisfy the gift. So far as the residuary legatees are concerned, they absolutely became entitled to all the property after the payment of these amounts, with a possibility of receiving these amounts also if they

were otherwise paid. In substance, therefore, the most that can be said is that the specific sums were subject to a condition subsequent upon the happening of which they would go to the residuary beneficiaries. But, as we shall show hereafter, an estate or interest constitutes a vested property right, although it may not technically be a vested as distinguished from a contingent estate. Future estates, conditional estates, and contingent estates are as much vested property rights as are present, absolute, unconditional estates, and are as much entitled to protection under the Constitution.

> "An estate is vested when there is an immediate right of present enjoyment *or a fixed right of future enjoyment.*"
>
> *Estate of Stanford*, 126 Cal., 122.

In order for an estate to be free of this tax, all that is necessary is that it shall be created by an instrument taking effect before the effective date of the act, and it is immaterial that the estate is contingent or subject to be destroyed by any condition subsequent. If it does ultimately vest under the deed it is not taxable. If the estate passes by the deed, it is not taxable. Here the stock, having been transferred by the deed, could not in the nature of things pass by the will. The estates which are taxed herein are estates passing by the deed and not by the will. Under the authorities herein set forth, such estates are not subject to an inheritance-tax statute subsequently going into effect.

The only property owned by Henry Miller at the time of his death was land and money situated in California of the value of about twenty thousand dollars ($20,000) (fols. 837-41). There is no showing that any of this has been re-

ceived by any of the legatees who are also beneficiaries under the deed of trust, but if it was all paid to them this would reduce the amount passing to the specific beneficiaries under the deed to that extent only and that amount would then go to the residuary beneficiaries under the deed of trust. So far, however, as this $20,000 represents land, it is specifically devised by the will to other persons (fols. 27-37). So this leaves only $10,000 of money which by any possibility could be so applied (fol. 841). The executors are directed to expend a greater amount than this for a burial place (fol. 36), so that no part of this in fact could go to the specific legatees who are also beneficiaries under the deed.

Under these circumstances we ask the court to consider the situation if the trustees under this deed refused to pay the specific beneficiaries anything and in justification of that refusal relied upon the language of the learned district judge to the effect that:

> "Up to the time of his death he still retained and possessed the lawful right to effectively destroy, or at least render practically valueless the interests of each of the individuals named as beneficiaries in said deed of trust. In order to attain this result it was only necessary for him to make a will revoking all former wills by him made, and by appropriate testamentary language direct his trustees therein named to pay the individual beneficiaries specified in said deed of trust one dollar or one cent, or any other nominal sum, in satisfaction of the provision contained in said deed, whereupon 'such payment shall be deemed to be in satisfaction of the provision herein made for such party.'"

We ask in all seriousness how would such a claim appeal to this court? The trustees could point to the fact that the grantor had in fact made a will by which he did revoke all former wills and by which he not only willed these same specific beneficiaries nominal amounts, but by which he willed them substantial amounts, and in fact the same amounts given them by the deed. But these specific legacies and the specific amounts given by the deed of trust amount to $314,551.40 (p. 568), and the estate of the decedent only amounts to $20,000, and no part of that can ever go to these beneficiaries. What court would construe the provision of paragraph III of the deed of trust to have the meaning or effect attributed to it by the learned judge of the district court for the purpose of working such a monstrous injustice? But its meaning and effect cannot be one thing for the purpose of carrying out the intention of the grantor and another thing for the purpose of imposing an inheritance tax.

It is clear that by this deed of trust the grantor divested himself of all interest in the property, and that by no possibility and in no contingency could an atom of the property ever be recovered by him. He by the transfer created estates commensurate with the property itself. Some of those estates were future estates, some of them were life estates, some of them were remainders, some of them were contingent, but they were all vested property rights created by the deed itself, and as fully protected by the Constitution as any other class of property rights. In order to avoid a repetition of authorities, we will not at this point cite further authorities on this subject, but in Point I of this brief we have referred to the cases which hold that where estates are created by deed

they immediately become existing property rights and not subject to an inheritance-tax act thereafter going into effect, and that this is true (1) although the deed may contain a power of revocation which is not exercised, or (2) although it may contain a power of appointment which is not exercised, or (3) although the estates created may be contingent, or (4) although the life tenant is given a power to destroy the remainder, or (5) although it is impossible to determine until a later date what, if any, property will be left for enjoyment by the remainderman, or (6) although the transfer was made in contemplation of death, or intended to take effect in possession or enjoyment after death, or (7) although the transfer was made for the purpose of avoiding an inheritance tax. (See cases cited under Point I of this brief.)

IX.

Review of Cases Relied upon by Defendants in Error and Respondents on Constitutionality of Statute Taxing Past Transfers.

In the State court the defendants in error and respondents cited certain cases on this subject which we will now review. They are as follows:

1. *In re Mazury's Estate*, 28 App. Div., 380; 51 N. Y. Suppl., 331:

In that case the deed in question was executed in 1890, but the inheritance-tax act was passed in 1885 (Stats. 1885, chap. 483), so that no question was involved as to the taxation of a transfer made before the passage of the act. The

case is also based on a dictum in *In re Seaman*, 147 N. Y., 69, which, as we pointed out in our opening brief, has been overruled by later New York cases.

2. *In re Ogsbury's Estate*, 39 N. Y. Suppl., 978:

In this case there was no question raised as to the deed being executed before the passage of the inheritance-tax act. The record shows that the deed was executed in 1885, and the inheritance-tax act was passed in that year (Stats., 1885, chap. 483). In that case, however, the transfer was made to trustees with directions to transfer the property to such persons as the grantor should by his will, or an instrument in the nature thereof, name, and in default of such will to such persons as should be entitled as next of kin. Under such circumstances it was very properly held that the grantor had complete control of the property during his life, and no one had any interest in the property until he either appointed someone to take it, or, by failing to make an appointment, it went to his heirs.

3. *In re Barbey's Estate*, 114 N. Y. Suppl., 725:

This case was decided in 1908, and no question whatever was raised as to the transfer being made before the passage of the act.

4. *In re Patterson's Estate*, 127 N. Y. Suppl., 284:

This case was decided in 1910, and the deed was executed in 1903, long after the passage of the inheritance-tax act, and the effect of a transfer before the passage of the act was consequently not involved.

5. *In re Douglas County*, 84 Neb., 506; 121 N. W., 593:

In this case the trust was created in 1904, whereas the inheritance-tax act was passed in 1901 (see sec. 11201, Cobbey's Ann. Stats. of Nebraska, 1909); consequently no question was or could have been involved as to the effect of a transfer made before the passage of the statute.

6. *In re Maris Estate*, 14 Pa. Co. Ct., 171; 3 Pa. Dist. R., 38:

In this case the inheritance-tax statute was passed in 1887, and the deed made in 1891, consequently no such question was involved.

7. *State ex. Bullen*, 143 Wis., 512:

The record in that case does not clearly show whether the transfer became effective before the passage of the inheritance-tax statute. The statute of October, 1903, is referred to, and the original deed or agreement was made in December, 1902, but the grantor repossessed himself of the property and reassigned it in 1907. At any rate, no point whatever was made as to the transfer being before the passage of the act, but, on the contrary, the only question involved in the case was one of domicile, the court saying:

> "Counsel say in their brief that there is but one question for determination by the court, namely, can the State of Wisconsin tax a contract made by one of its residents when in a foreign State, whereby he transfers property which is in the foreign State, and

> which never has been in the State of Wisconsin, even though constructively the transfer was 'intended to take effect in possession and enjoyment at or after the death of the transferrer.'"

This question of *situs* was the only question argued or decided, and consequently the case is not authority on any other point.

8. *In re Hart's Estate*, 162 N. Y. Suppl., 716; 98 Misc. Rep., 515:

In this case the transfer was made in 1888, and while the act of 1892 was referred to, as we have already seen, the New York Inheritance Tax Act was passed in 1885, and no question was raised as to the deed being before the passage of the act. The deed in question provided:

> "If the trust was in existence at the date of decedent's death, the trustees were to pay the trust fund to such persons as the decedent by his last will should direct and appoint, and in default of such direction, to pay it to his next of kin."

It will be seen that the case depended on the rules applicable to powers of appointment, which we have elsewhere considered.

9. *In re Dobson*, 132 N. Y. Suppl., 472:

In this case the inheritance-tax act was enacted in 1901, and the transfer made in 1902, so that no point was or could be involved as to a deed made before the act.

10. *People ex. Moir*, 207 Ill., 168; 69 N. E., 885:

In this case the decedent died in 1898, and the inheritance-tax act was passed in 1895 (Hurd's Rev. Stats., 1899, p. 1460), so that no such question was presented in that case.

11. *Connell's Estate*, 5 Pa. Co. Ct., 368:

This case arose in 1888 and was governed by the act of 1826. The exact date of the transfer does not appear, but it was four years before the decedent's death, and therefore obviously long after the passage of the act in question, and no point was raised as to the transfer being made before the act.

12. *In re Sharer*, 73 N. Y. Suppl., 1057:

There was no such point raised or considered in this case. All that was held was that the deed in question was not delivered. The date of the deed is not shown, but the case arose in 1901, and, as we have seen, the New York Inheritance Tax Act was enacted in 1885.

13. *Re Jones*, 120 N. Y. Suppl., 862:

No such point was raised in this case. The date of the deed is not shown, but the case arose in 1909, and the deed was executed five years before death. Obviously it was long after the inheritance-tax act.

14. *Re Line's Estate*, 155 Pa. St., 378; 26 Atl., 728:

In this case the inheritance-tax act was passed in 1826, and the deed was made in 1887 and was held taxable under

the act of 1826. Obviously no such point was involved in this case.

15. *Commonwealth vs. Smith*, 5 Pa. St., 143:

In this case the inheritance-tax act was passed in 1826 and the decedent died in 1842. The only question involved was a question of domicile, and no question was raised as to the transfer being made before the passage of the act.

16. *Nunnemacher vs. State*, 129 Wis., 190; 108 N. W., 627.

No such point was involved in this case. The only question involved was the general constitutionality of inheritance-tax laws.

17. *Westhus vs. Union Trust Co.*, 164 Fed., 795:

This case does not seem to be at all in point. It arose under the Federal Inheritance Tax Act of 1898, which made the tax payable one year after death. It was repealed in 1902 with a saving clause as to all taxes "imposed" theretofore, and forbade any tax on any contingent interest which had not become absolutely vested in possession and enjoyment theretofore. It was held that a life estate created by will became vested on the death of the testator, that the tax was then "imposed," and was therefore governed by the saving clause. We fail to see any pertinency of this case to the case at bar.

18. *Minot vs. Stevens* (Mass.), 93 N. E., 973:

This case involved the exercise of a power of appointment. The inheritance-tax act of 1909 provided for the taxation

of property passing by failure to exercise a power of appointment, or by the exercise of the power. It was held that since the donee of the power had absolute power of disposition, those taking by the exercise of the power or those taking by default of the exercise of the power had no vested property right, and therefore could not object to the act taxing the same.

19. *State vs. Furnell*, 20 Mont., 299; 51 Pac., 267:

This case involves cases dealing with the taxation of estates in probate. In that case the act imposed a tax "upon all estates which *have been probated before* and distributed after the passage and taking effect of this act." The court upheld this act on the theory that the property was in the custody of the State and being administered upon by the probate court, whose duty it was to conserve the property and determine who was entitled thereto, and that therefore the actual receiving of the property by distribution was a taxable privilege. In reaching this conclusion the court clearly pointed out the difference between the right to property created by deed and the right to receive it as an heir through the probate court, saying:

> "The right to dispose of property during the lifetime of the owner cannot be separated from the property itself, and therefore to tax the right of disposal by contract, in the lifetime of the owner, even though to take effect at his death, is to tax the property itself."

Of course in the case of a transfer by deed, the State has no control over the property such as the probate court exer-

cises in cases of the passage of property by death, and this case therefore has no applicability to the case at bar.

20. *In re Short's Estate*, 16 Pa. St., 66:

This case is a peculiar one, and should be carefully considered. The inheritance-tax act of 1826 imposed taxes upon certain interests and property "being within the Commonwealth." By judicial decision this language was construed to apply to the property taxed and not to the persons taxed, so that consequently only the property within the Commonwealth could be taxed. In 1850 the Legislature passed an "explanatory" act by which it was declared that the words "being within the Commonwealth shall be so construed as to relate to all persons who *have been* at the time of their decease, or *now may be* domiciled within this Commonwealth, as well as to estates, and this is declared to be the true intent and meaning of this act." The question arose as to whether this legislative construction of the act could apply to a pending probate proceeding. The court held that the words "have been" clearly showed an intention to make it retroactive. The reasons upon which the court reached the conclusion that to apply it to a pending estate in probate was not unconstitutional were thus expressed:

> "More pointed words to make the act retrospective as well as prospective could not have been chosen; and it will scarcely be said that the legislature had not power to make it so, *at least as to assets remaining in the hands of the executor or administrator*. No clause of the constitution forbids it to extend a tax, already laid, or to tax assets not taxed before, and in establishing its power of interpretation, it has only done indirectly what it was competent to do directly."

The meaning of this undoubtedly was that under the Constitution of Pennsylvania there was nothing to prevent a direct tax upon the assets of an estate in administration in probate, and that since the Legislature could have directly imposed such a tax it could indirectly impose it by construing an act already on the statute books to provide for such a tax. This case was taken by writ of error to the Supreme Court of the United States, and the decision of that court is found in *Carpenter vs. Commonwealth*, 17 How., 456. That court stated that it had no authority to "revise the act of Pennsylvania, upon any grounds of justice, policy, *or consistency to its own Constitution*. These are concluded by the decision of the public authorities of the State." That court in holding that an estate pending in probate was subject to the imposition of such a tax, said:

> "It is in some sense true, that the rights of donees under a will are vested at the death of the testator; and that the acts of administration which follow are conservatory means directed by the State to ascertain those rights, and to accomplish an effective translation of the dominion of the decedent to the objects of his bounty; and the legislation adopted with any other aim than this, would justify criticism, and perhaps censure. But until the period for distribution arrives, the law of the decedent's domicil attaches to the property, and all other jurisdictions refer to the place of the domicil, as that where the distribution should be made. The will of the testator is proven there, and his executor receives his authority to collect the property by the recognition of the legal tribunals of that place. The personal estate, so far as it has a determinate owner, belongs to the executor thus constituted. The rights of the donee are

subordinate to the conditions, formalities, and administrative control, prescribed by the State in the interests of its public order, and are only irrevocably established upon its abdication of this control, at the period of distribution. If the State, during this period of administration and control by its tribunals and their appointees, thinks fit to impose a tax upon the property, there is no obstacle in the Constitution and laws of the United States to prevent it. *Ennis vs. Smith*, 14 How., 400; *In re Ewin*, 1 Cr. & Jer., 151; 1 Barb. Ch., 180; 6 W. H. & G., 217; 21 Conn., 577.

'The act of 1850, in enlarging the operation of the act of 1826, and by extending the language of that act beyond its legal import, is retrospective in its form; but its practical agency is, to subject to assessment, property liable to taxation, to answer an existing exigency of the State, and to be collected in the course of future administration; and the language retrospective is of no importance, except to describe the property to be included in the assessment. And as the Supreme Court has well said, 'in establishing its peculiar interpretation, it (the Legislature) has only done indirectly what it was competent to do directly.'"

It is clear from this that both the State and Federal court interpreted this as a property tax, or "fiscal imposition." Whether it be so regarded, however, or whether it be regarded as a tax imposed upon the privilege of receiving the property from a probate court, in consideration of the inherent powers of that court to preserve the property and determine the rights thereto, it is clearly not in point in this case, where the beneficiaries receive their property by

grant and without the interposition of the probate court, and of course under the Constitution of Nevada the tax could not be upheld as a property tax, as property taxes under the Constitution of Nevada must be assessed uniformly upon all property in the State (Const., art. 10, sec. 1).

22. *People vs. Carpenter* (Ill.), 106 N. E., 302:

Counsel for defendants in error and respondents seek to find support in this case for their position that a tax may be imposed upon a transfer by deed after the execution and delivery thereof. That case das relied upon by the State for the same purpose before the Supreme Court of California in the case of *Hunt vs. Wicht*, 174 Cal., 205; 162 Pac. 639; and the Supreme Court of California, after holding that an inheritance-tax act could not constitutionally be made applicable to an estate created by deed before its passage, said:

> "There is no New York decision that can fairly be construed as opposed to this view. It is clearly recognized as correct in *People vs. Carpenter*, 264 Ill., 400, a case relied on for a contrary conclusion, and we have found no case which would sustain a conclusion that where an estate is fully vested, by reason of a lawfully executed grant or contract, the Legislature may subsequently impose a succession tax on account of the transfer."

An examination of the case itself shows a peculiar situation. The grantor, Augustus C. Carpenter, made a grant of property, reserving a life estate in himself, granting a life estate to Nellie Clark and remainder to Augustus Albert

Clark and Annie C. Newell. The court held that the remainder to August Albert Clark and Annie C. Newell vested immediately upon the delivery of the deed, and that it could not be made subject to an inheritance tax thereafter imposed, but notwithstanding this, it held that the life estate granted to Nellie Clark was subject to such a tax because it took effect in possession and enjoyment upon the death of the grantor. From this last part of the decision two of the judges dissented. That the decision is fatally inconsistent is clear, for the remainder, so far as possession and enjoyment is concerned, vested after the death of the grantor as well as the life estate, and if one was taxable the other would seem to be equally taxable. The decision however was based on a dictum in the case of *Re Seaman's Estate*, 147 N. Y., 76, which we have shown has been disapproved by later New York cases. This case is obviously inherently inconsistent, and not authority for either party on the constitutional question involved in this case.

The foregoing includes a review of every case cited by defendants in error and respondents in the State court, except such as were cited by the trial judge and which are reviewed elsewhere by us.

X.

Review of First Decision of the Supreme Court of Nevada.

There may be some doubt as to what part of the first decision rendered by the Supreme Court of Nevada was intended to be adhered to by the court in its decision on re-

hearing. We shall therefore review all of the grounds relied upon by it in that decision.

1. *The fact that the transfer was in contemplation of death, or intended to take effect in possession or enjoyment at or after death, is immaterial.*

In the first place, the first opinion of the Supreme Court of Nevada points out that it is the contention of the State that the deed of trust was made in contemplation of death, or was intended to take effect *in possession or enjoyment* at or after death within the meaning of the terms of the act in question, and refers to the language in our brief, in which we, for the purpose of this appeal, admit that this would be true if the act had been in force at the time of the transfer, and later on in the opinion refers to the fact that it is within the power of the legislature to impose a transfer tax on those particular classes of transfers, and that it was the intention of the act to tax all transfers of property whether by will or the intestate laws, or by deed made in contemplation of death, or to take effect in possession or enjoyment at or after death. There is no doubt about the correctness of these propositions, but in all of the cases which have been decided and which are cited above where it was held that a transfer was not taxable, under an act not in effect at the time of the transfer, it was admitted that the particular transfers were either made in contemplation of death or intended to take effect *in possession or enjoyment* at or after death, but still they were held not taxable under acts which went into effect after their execution. We cannot but think that there is some confusion growing out of the peculiar nature of these particular forms of trans-

fer. The Legislature can undoubtedly, as pointed out in the opinion, tax any form of transfer, as for instance an ordinary transfer or grant, bargain, and sale of the fee-simple title, or a gift deed of the fee-simple title. The mere admission or proof that the transfer was a grant, bargain and sale deed of the fee-simple title, or a deed of gift of the fee-simple title, would not, we assume, make the same taxable if there were no act in force imposing such a tax at the time of such deed. In other words, suppose the Legislature should pass an act imposing a tax on all deeds of gift. If the deed of gift were made before the act went into effect, we assume that no one would even contend that it was subject to the act, which necessarily establishes the principle that the mere fact that the instrument answers the description of the instrument which is subjected to the tax does not make it taxable unless it was executed after the act became effective. This principle is equally applicable whether the transfer be a transfer of the fee or a transfer creating a life estate and a remainder, or a transfer creating a trust or a transfer made in contemplation of death, or any other kind of a transfer. The Legislature having designated the kind of a transfer that is taxable, that kind of a transfer is taxable if made after the act becomes effective, and such a transfer is not taxable if made before the act becomes effective, and, therefore, either proof, finding, or admission that the transfer is of the character mentioned in the act in no way establishes its taxability, where made prior to the date when the act became effective.

2. The grantor recognized that the transfer was irrevocable.

The opinion states:

> "It appears that Henry Miller once expressed a desire to change one of the legacies specified in the trust deed, but he was advised by his counsel that it was not possible for him to do *so as no power of revocation had been reserved in the deed.* * * * The deceased, after the execution of the instruments and delivery of the deed, was advised that however much he desired to change any legacy provided for therein he could not do so, because no power of revocation had been reserved in this deed. This tends to indicate that the deceased in the first instance did not regard the indenture as irrevocable. We do not doubt the sincerity of the advice," etc.

The suggestion that the evidence on this subject was indicative of the fact that the grantor did not in the first instance regard the indenture as irrevocable, overlooks the only testimony on this subject, which is found at folios 380-384. That testimony is as follows:

> "Q. I will ask you, Mr. Treadwell, if after this trust deed and these certificates were executed and delivered, placed in the safe deposit box as you testified, you had any further conversation with Mr. Henry Miller with reference to them?
>
> "A. Yes, I did. I do not remember the exact date, but I would estimate it as probably about a year after the transaction that I have testified to.
>
> "Q. What was that conversation?
>
> "A. Mr. Miller spoke to me about the same matter that he had spoken to Mrs. Nickel about when she got the deed of trust out of the safe deposit box. He stated to me that there was a provision in the deed of

trust in favor of a certain party, one of the specific legatees, beneficiaries, and he said that certain things had happened and he would like to change the provision of the deed of trust in favor of that party if it was possible to do so. He asked me whether it was. I do not know myself whether this was before he had had Mrs. Nickel get the deed of trust out and looked at or not. At any rate, he asked me if it was possible for any such a change to be made. I told him in drawing the deed of trust that no power of revocation had been reserved, and that it was, therefore, impossible to make any change in it of any kind. *And he said that he thought that was so, no use to talk about it any further.* That was a way he had of ending a conversation when he was through with it, and he used that characteristic expression.

"He was very anxious, I might say, to make this particular change. Something had happened in connection with this particular beneficiary that required that that change, in his judgment, should be made. That was the substance of the conversation at that time.

"I did have one other conversation, I do not know as it is of particular importance, but I think about six months before Mr. Miller's death he spoke of the deed of trust and said, *'I am not sure, Mr. Treadwell,' he says, 'that I did justice to myself when I put all this property out of my hands.'* That was the substance of what he said at that time. I think those were the only times at which the subject was ever mentioned betwen us."

This is the only testimony on the subject, and it shows that the grantor had himself thought that he could make no change in the deed of trust, and that he fully recognized

that he had irrevocably put this property out of his hands. Moreover, the question as to whether a grantor has a power of revocation is a mere question of law growing out of the language and nature of the instrument and the law applicable thereto.

3. *The grantor reserved no power of revocation.*

This naturally brings us to the third point in the decision, namely, as to the right of the grantor to revoke this deed. On that subject the opinion says:

> "It is only in cases where other parties besides the person creating the trust have an interest therein that the trust becomes irrevocable. We see nothing in the deed that could have prevented the deceased from revoking the trust had he desired to do so. No beneficiaries or third party, as far as the record shows, had any present interest in the property to prevent the deceased, if necessary to do so, from invoking a court of equity to revoke the trust."

By the deed of trust, and the actual transfer and delivery of the property referred to therein to the trustees, the grantor granted the whole estate in the property to the trustees, in trust to receive the income and pay the same to the grantor during his life, and upon his death to pay the income therefrom to certain designated persons and to sell certain parts thereof and pay from the proceeds of sale certain amounts to certain designated persons, and designated the persons to whom the property should go after the expiration of the trust. Each one of the beneficiaries of the income, proceeds of sale and *corpus* of the property immediately had a vested

property right in the trust property, and a right to compel the execution of the trust, and the trustees immediately became entitled to the possession and control of the property upon the trusts in question. The fact that those estates would not come into the actual possession and enjoyment of the parties until a later date in no way affected them as vested property rights, and under such circumstances the grantor has no power to revoke the trust, nor can he appeal to a court of equity to enable him to do so.

In the case of *Gray vs. Union Trust Co.*, 171 Cal., 637, the grantor created a trust to pay the income to the grantor during her life and upon her death the trust property was to go and vest as she should provide in her last will and testament, and if she left no will then according to the laws of succession. It was held that such a deed created a vested estate in remainder in her heirs-at-law, subject to her power to defeat it by the execution of a will, and that this was a vested property right, and that she had no power to revoke the deed.

In the case at bar immediately after the execution of this deed any one of the beneficiaries of these future estates could have gone into a court of equity and controlled the execution and administration of the trust; could have compelled the trustees to act; could have petitioned the court for their removal in case of improper conduct; could have petitioned for the appointment of new trustees in case of their death or removal, and could by any appropriate equitable action prevent any dissipation of the fund, either by the trustees or by the grantor, and they, therefore, clearly had vested property rights, which could not be destroyed by the mere whim of the grantor. There is no more power to revoke a deed

creating future estates than a deed creating present estate, and there is no more power to revoke a deed of trust than there is to revoke a deed in fee. In neither case is there any right of revocation unless that right is expressly reserved by the deed.

4. *The instrument was not testamentary in character.*

Again the court says:

> "We do not say that it is necessary to the validity of the deed that it should convey an estate in immediate possession, but it is necessary that it should take effect in interest upon its execution, though the right of possession or enjoyment may not take place until the happening of a certain event (*Wall vs. Wall*, 64 Am. Dec., 152). If, however, the interests created do not arise until the death of the donor, or some other future time, the instrument cannot be a deed although it may be so denominated by the maker, may have express words of immediate grant, may have sufficient consideration to support a grant, and may be formally delivered (*Babb vs. Harrison*, 70 Am. Dec., 204). We do not deny that the donor may convey an interest, reserving a lifetime estate to himself, but a deed, if made with a view of the disposition of a man's estate after his death, inures in law as a devise or will (*Wellborn vs. Weaver*, 63 Am. Dec., 242.)"

This and other language used in the opinion we take it are intended as holding that this instrument was, to use the language of the court, of "posthumous operation," or testamentary in character.

In the first case cited by the court, namely, *Wall vs. Wall*, 64 Am. Dec., 152, the party executed an instrument granting certain property by the usual words of grant and then containing the following provision:

> "All of the aforesaid property I do hereby entail to my aforesaid brothers and sisters, to them and their heirs, in and for their own personal use and benefit, and not to be disposed of during their lifetime—but to be used for the benefit of raising each of their families—the deed to take effect, as far as regards the handing over of the property, at my death; and I reserve to myself the right to revoke it at any time during my life, by filing in the clerk's office a written revocation under my hand and seal. And I do hereby make known and declare that the signing, sealing, and delivery of this deed and placing the same amongst my papers is intended by me as a delivery of said property at my death, and to take effect at that time."

The instrument was formally acknowledged and was afterwards delivered to one of the grantees, together with a will, with directions to keep them safely. He subsequently called for the papers and they were returned to him, and at the time of his last illness he wrote to his brother stating that the deed was with certain papers at his home, and to have the provisions carried out. The question was whether or not the instrument was in fact to be considered as a deed or a will, and in solving that question the court referred to the fact that it purported to be a deed; that it was acknowledged as a deed and delivered as a deed, and that the first part of the instrument purported to convey the property *in praesenti;* and the court construed the peculiar provisions

of the instrument as meaning that the instrument itself should take effect at once, but that the property should not be delivered until after death. The court then proceeded to say:

> "We are therefore of opinion that it was a deed of conveyance of the property embraced in it, subject to the life estate of the donor. And it only remains to consider whether a deed conveying an estate to take effect in possession at the death of the grantor is valid. It is certainly not necessary to the validity of a deed that it should convey an estate in immediate possession; but it is necessary that it should take effect in interest upon its execution, though the right of possession or of enjoyment may not take place until the happening of a future event.
>
> * * * * * * *
>
> "Upon the whole, we consider that this deed conveyed the present right to the property, to be enjoyed in possession at the donor's death, and subject to his power to annul it in the way limited in the deed. This was a substantial right in the donees, which excluded the general power of alienation by the donor, and of revocation in any other mode than that prescribed in the deed. And in this consists the difference between such a conveyance and a will; that by the former a present interest vests which will take place in possession *in futuro*, unless defeated in the mode and according to the terms specified in the conveyance; and in the latter, no right, estate, or interest whatever vests until the death of the testator. In the one case the conveyance takes effect *in præsenti* to a certain extent; in the other it has no effect whatever until the death of the testator."

It will be seen, therefore, that that case is not only not an authority in favor of the contention that the deed of trust in the case at bar is testamentary in character, but is a strong authority to the effect that a deed, although the grantor reserves the possession of the property during his life and reserves a power of revocation, is still a deed and vests a present interest in the property. Of course, in the case at bar, the grantor did not remain in possession of the property and did not reserve any power of revocation.

The next case cited in the above quotation from the opinion is *Babb vs. Harrison*, 70 Am. Dec., 204. In that case it was held that a certain instrument by which the party did "give, make, and bequeath" unto his son a certain negro woman was testamentary. It is unnecessary to review the particular features of the instrument, which were considered by the court in reaching this conclusion, but the legal principle was correctly stated as follows:

> "The prominent distinction between a will and a deed is, that a will has no operation until the death of the testator, and that a deed must take effect on its execution, and immediately pass the estate or interest given, *although it is not essential that the interest shall immediately pass into the possession of the donee.*"

The last case cited by the court is *Wellborn vs. Weaver*, 63 Am. Dec., 235. That case involved the question whether a certain deed had been delivered, a question not involved here, as the trial court found that the deed of trust in the case at bar was delivered. In that case the deed was turned over to a certain party to hold *as the agent of the grantor*

until his death, and then to deliver it to the donees. This was held by the court not to be a good delivery in escrow, because the delivery was not to a third party, but to an agent of the grantor. It was therefore held that the deed, not having been delivered, could have no operation as a deed. And it was in that connection that the court said that "if it is not to operate until after the death of him who makes it, it is a will, whatever be its form."

None of these cases can be relied upon as establishing that the deed of trust in the case at bar was not a deed of trust, but merely testamentary in character. The instrument was called a deed of trust, and had formal party of the first part and parties of the second part, and for a recited consideration purported to presently "grant, bargain, sell, transfer, convey and set over unto the said parties of the second part" the property in question upon certain trusts therein set forth. That this trust immediately took effect is obvious, because the deed of trust provided that the trustees should receive the rents, issues, and profits of the property during the lifetime of the grantor and should pay the same to the grantor during his life. This alone was a valid trust, and conveyed the entire estate to the trustees and left in the grantor only the right to insist that the trust be performed (Civil Code of California, sec. 863).* The instrument then proceeded to provide the further trusts upon which the property should be held after the death of the grantor. By paragraph III the trustees were given the unrestrained power of sale of the

*"SEC. 863. Except as hereinafter otherwise provided, every express trust in real property valid as such in its creation, vests the whole estate in the trustees, subject to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

property. By paragraph IV the trustees were given the power to appoint additional trustees, and it was executed and acknowledged as a deed of trust, and was immediately delivered as such. That the instrument was intended to have immediate operation is conclusively shown by the fact that the property covered by it was immediately endorsed, assigned, and actually transferred and delivered to the grantees, and they accepted the trust and immediately entered upon the discharge of their duties as such trustees. Title to the shares of stock could have been transferred to the trustees without any deed of trust whatever by merely endorsing and delivering them. The deed simply evidenced that transfer and declared the trusts upon which the transfer was made.

But this whole discussion as to this deed of trust not being in fact a deed of trust, but being merely testamentary in character, is contrary to the pleadings and findings in the case. By the petition herein the petitioners alleged—

> "That on or about the 17th day of April, 1913, the deceased, Henry Miller, made, executed, and delivered a deed of trust to Nellie Miller Nickel and J. Leroy Nickel, as trustees" (fols. 17-18),

and this deed of trust is set forth as an exhibit to the petition (fols. 100 *et seq.*). While it was alleged in the petition that the deed was made in contemplation of death and was intended to take effect "in possession or enjoyment" after death, there was no suggestion made that the deed of trust was not in fact a deed of trust, or was not made, executed, and delivered at its date, or did not presently pass title to the property therein described. The findings are:

"That on April 17, 1913, Henry Miller, deceased, made, executed, and delivered that certain deed of trust, dated April 17, 1913, and recorded in Book 972 of Deeds (N. S.), page 170, of the county recorder's office of the city and county of San Francisco. A copy of said deed of trust is annexed to the petition in this action. That Nellie Miller Nickel and J. Leroy Nickel were designated as trustees under and by virtue of said deed of trust, and that the said trustees on the same day, to wit, April 17, 1913, accepted the said trust, by an endorsement in writing thereon, duly signed and acknowledged by them, which is likewise made a part of the petition herein; that on the same day said Henry Miller, deceased, duly and regularly executed his last will and testament, a copy of which is attached to the petition and made a part thereof; that at the time the said deed of trust and said will were executed by the deceased, Henry Miller, he was an invalid, under medical care and treatment, and afflicted with physical ailments from which he never recovered; that said trust deed was recorded in the city and county of San Francisco, October 20, 1916; that said deed of trust was never recorded or placed of record in the State of Nevada, or any of the counties thereof; that prior to October 20, 1916, said deed of trust had been kept in a safety-deposit box, to which the trustees, J. Leroy Nickel and Nellie Miller Nickel, had exclusive access; that in the same safety-deposit box there was deposited, on or about April 17, 1913, certificates of stock of Miller & Lux, Incorporated, which said certificates of stock were endorsed, assigned, transferred, and delivered by the said Henry Miller to said trustees on the same day as the execution of said deed of trust" (fols. 1761-5).

The most conclusive proof that the transfer took immediate effect is found in the fact that the certificates of stock stood in the name of Henry Miller and were by him indorsed, transferred, and delivered to the trustees and were by them surrendered and new certificates of stock were issued to and in the name of the trustees. (See fols. 1609-15.) The new certificate is found at folios 1650 to 1653 in the name of Nellie Miller Nickel and J. Leroy Nickel, as trustees, and was dated the 17th day of April, 1913. See also to the same effect folios 375-9.

The case, therefore, as presented is that the grantor, being the owner of this property, made, executed, and delivered a deed of trust which purported to presently convey the property to the trustees, and at the same time physically endorsed the property to and delivered it to them, and they immediately, in writing, accepted the trusts upon which it was conveyed, and immediately began to receive the rents, issues, and profits of the property and to distribute them in accordance with the deed of trust. If such an instrument did not create vested property rights in the trustees and each of the beneficiaries therein named, then no deed of trust can create such interests where it provides for the payment of the income of the property to the grantor during life.

5. *The deed of trust could not be revoked or changed by a will.*

The next portion of the opinion deals with the power of revocation of this deed of trust, and on that subject the following language is used:

"It is only in cases where other parties besides the person creating the trust have an interest therein that the trust becomes irrevocable. We see nothing in the deed that could have prevented the deceased from revoking the trust had he desired so to do. No beneficiaries or third party, as far as the record shows, had any present interest in the property to prevent the deceased, if necessary to do so, from invoking a court of equity to revoke the trust.

"The appellants and other appointees under the will had no such interest, because the deceased could have revoked his will and made another in favor of other parties. His beneficiaries in the indenture had no such interest, because the deceased had power by will to secure the property to others and entirely exclude them from all interest therein."

By the terms of the deed of trust no power of revocation was reserved by the grantor, and the general rule is that a grantor who has made a deed of trust by which he has reserved the income for his life, and provided to whom the same should go after his death, cannot revoke the same (*Gray vs. Union Trust Co.*, 171 Cal., 637). Every beneficiary of the trust created by the deed necessarily obtained an interest in the property or in the performance of the trust. Some of those interests may have been more remote than others, but they were all immediately created and immediately became vested property rights and subject to protection as such. The court refers to the right of the deceased to invoke a court of equity to revoke the trust, and while he would undoubtedly have a right to invoke a court of equity to do so it is expressly held that such a court would have no power to grant his request (*Gray vs. Union Trust Co., supra*).

The whole argument seems to be that, because the grantor at the same time executed a will, which, of course, he could revoke, therefore he could revoke the deed of trust, or that by revoking the will he could revoke the deed of trust. In this connection it is said that because the deed of trust and will were executed on the same date they should be construed together. As a rule of construction we do not deny that two instruments executed on the same date should be construed together, but this does not mean that where a deed of trust and a will are executed on the same day, the deed of trust should be construed to be a will or the will be construed to be a deed of trust. The mere fact that two instruments are executed on the same date, one denominated "Last will and testament of Henry Miller" and the other denominated "Deed of Trust" (fol. 100), would indicate that the parties knew that one of them was a deed of trust and would operate as such and the other a will and would operate as such. The deed of trust only conveyed certain specific shares of stock therein described (fols. 102-3). None of these shares of stock are referred to in the will, but, on the contrary, the will first disposes of three parcels of real estate (fols. 26-33), provides a burial place for the testator (fols. 33-7), and then devises and bequeaths all of the rest, residue, and remainder of his estate without description (fol. 37). It is perfectly obvious from this that the will would operate only on the property which the decedent had at the time of his death, and would not operate on property which, simultaneously with making his will, he conveyed away. Neither the original will or any revocation of it, or any codicil to it, or any change of it would have the remotest effect upon the property conveyed by the deed of trust, or upon any interest

or estate created therein. The only reference in the deed of trust to the will is that found in paragraph III (fols. 152-3), which reads as follows:

> "If any of the sums directed by this deed to be paid to or set aside for the benefit of the persons named herein shall be paid or set aside in whole or in part by any trustees named in the last will and testament of said party of the first part from any estate coming into their possession under said will, such payment shall be deemed to be in satisfaction of the provision herein made for such party, and also in satisfaction of the provision in such will made for such party, in whole or in part, as the case may be, and the parties of the second part shall hold and dispose of the property conveyed hereby upon the remaining trusts designated herein."

In the first place it will be noted that here is conclusive evidence that the grantor had in mind the distinction between a deed of trust and a will, which is also shown by the fact of the execution of those two instruments. This provision of the deed of trust is not referred to expressly in the majority opinion, and we do not know whether or not it is intended to be relied upon by the author of that opinion as supporting the statement that the grantor "had power by will to secure the property to others and entirely exclude them from all interest therein." At all events, it is clear that there is no other provision in the deed of trust which it could even be claimed would confer any such power. There is no provision in the deed of trust giving the grantor any power to revoke it, or to make any supplement to it, or to in any way direct that any of the property should go in any

way except as provided in the deed of trust, and the provision which we have just referred to was simply for the purpose of preventing a beneficiary of some specific amount under the deed of trust and who was also made a legatee under the will of a like amount from receiving both amounts, and it was therefore provided that in case he should receive like amounts from the trustees under his will that should satisfy the provision in his favor in the deed to that extent, and that the property should then be held by the trustees on the remaining trusts. No change that the grantor might make in his will would have any effect whatever on this deed of trust or this property. If the will should be revoked *in toto* so that no provision was made for any of the people mentioned in the deed of trust, the amounts involved in the deed of trust would have to be paid exactly as therein provided. If the will were changed so as to give any of the parties named as beneficiaries in the deed of trust either greater or less amounts than those specified in the deed of trust, that would in no way reduce or increase the rights or amounts which they would take *under the deed of trust*. Their rights to those amounts are absolutely fixed and determined by the deed of trust, and the only effect that the will could have on them would be that a payment under the will would discharge them.

6. The active duties of the trustees began immediately upon delivery of the deed.

Another suggestion in the opinion is based upon the language of the deed of trust as to the trusts upon which the property shall be held after the death of the grantor. The

structure of the deed of trust is the ordinary structure of deeds of trust of this character. By it the property in the first instance is absolutely transferred to the trustees. It then proceeds in the habendum clause as follows:

> "To have and to hold the same as such trustee upon the following uses and trusts, and for the following uses and purposes, that is to say."

It will be seen by this that the trustees are to immediately have and hold the property upon the trusts that follow, and those trusts are then expressed, in paragraph I, to receive the rents, issues, and profits of the property and pay the same to the grantor during the term of his natural life, and, in paragraph II, that upon his death they shall take and hold the property, sell sufficient amounts thereof, and collect the rents, issues, and profits thereof and dispose of the same and the proceeds of sale in the manner therein set forth. The mere fact that in this paragraph it is recited that they shall "take and hold" the property is entirely immaterial, because the previous part of the deed of trust had already transferred the property to the trustees and provided that they shall have and hold it upon the trusts specified. This, therefore, did not contemplate any new title passing or any new taking or holding by the trustees, but simply that the trusts upon which they would hold would change. The property itself and the entire estate therein, to the extent necessary to feed the trust, necessarily passed to the trustees immediately upon the execution of the deed of trust, and the ultimate remainder after the completion of the trusts, necessarily then also came into being by the provision in the deed of trust a

to whom the property should go upon the expiration of the trust.

7. *The motives which actuated the deed are not material.*

The opinion also states:

> "No reason is suggested why Miller should conclude himself from the right of disposing of his property by will, or that the deed should be construed as nullifying his will."

We respectfully submit that the reason which actuates a party in making a deed is very largely, if not entirely, immaterial to any question involved in this case. Where a man disposes of his property for the benefit of his relatives, the law implies that consideration growing out of relationship of blood, which is not only amply sufficient in law, but is one quite as efficacious as a money consideration. If a man conveys his property to his immediate relatives the conclusion is that the reason he conveyed it was because he desired them to have it. As to the suggested right of disposing of his property by will, it is obvious that for reasons satisfactory to the grantor he did not prize that right quite as highly as some persons might. In view of the doctrine which has lately become prevalent, fashionable, and popular in certain quarters that a person has no right to dispose of his property by will, he might have concluded that this right was shadowy in the extreme. In fact, in another part of the opinion it is suggested that it may have been that he made the conveyance because he recognized that this right was presently to be rendered nugatory by the imposition of a tax

of about 30 per cent by the State of California (State of Cal., 1915), a tax of 25 per cent by the Federal Government (act of Congress of 1917), and possibly equally large taxes by the State of Nevada. Assuming, for the sake of the argument, that this was in the mind of the grantor, it would seem sufficient reason why he should be willing to conclude himself from the right of disposing of his property by will. We might suggest that it is rather inconsistent to argue that, having this object, he executed an instrument which in legal effect was only a will and, therefore, was in no way sufficient to accomplish the object in question. It is well settled that the mere fact that a transfer of this kind is made because the party has in mind that inheritance-tax laws are about to be enacted can have no effect whatever on its taxability (*State ex. Probate Court*, 102 Minn., 268; 13 N. W., 888). As was said in that case:

> "It is possible that David Foxer and the members of his family at the time of these transactions may have had the possibility of an inheritance tax in mind; but the law which the State is now attempting to apply was not then in force, and was not enacted until two years and more thereafter. The case therefore, does not present the question of the effect of a transfer of property with the intention and for the purpose of avoiding the operation of an existing inheritance tax law."

Or, as was said by the Supreme Court of California in *Hunt vs. Wicht*, 174 Cal., 295; 162 Pac., 639:

> "It is immaterial, so far as the question we have discussed is concerned, that it is alleged that the transfer was made 'in contemplation of his death and with

out valuable consideration.' The estate conveyed fully vested at the time of the delivery of the deed in escrow, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was no law imposing a tax on any such transfer."

The right to retain the ownership of property until one's death is a right which is generally prized by the owner, and if the grantor in this case wished to forego that right and dispose of his property at a time when there was no act in force taxing a transfer *inter vivos* or less burdensome laws, we are unable to see anything either reprehensible or improper in his doing so. His act is no more subject to a transfer tax if done at that time than would a sale of any other property be subject to a stamp tax because the grantor knew that some species of stamp tax or excise tax was thereafter to be imposed on a transfer thereof.

8. *To avoid a possible future law is neither illegal, immoral, nor reprehensible.*

This naturally brings us to the portion of the opinion that the period between the passage of the law and the date it became effective "was not intended to afford ingenious minds an opportunity to devise schemes to defeat the purpose of the act." We submit that the purpose of the act was to lay down a rule of conduct which should govern all after a certain date. It did not lay down any rule of conduct governing people before that date. The right to transfer property before that date was as much a legal right as was the right of a

party to sell intoxicating liquors after the passage of the dry law but before it went into effect. Why the Legislature makes an act to go into effect at a future date is not important and not the subject of judicial investigation. The fact that it makes it go into effect at a future date is one appearing on the face of the act, and the only conclusion is that the Legislature did not desire that the act should be a rule of conduct until that time. There is no such a thing as defeating the purpose of an act when it is not in force and when it is expressly provided that it shall not be in force. Nor is there anything ingenious or anything in the nature of a scheme for a man to make a transfer which the law permits him to make and the nature and character of which is clearly expressed. If the deed of trust had never in fact been delivered, and if the property represented by it had never in fact been transferred to the trustees, then the instrument would have been merely colorable, but when the grantor both in fact and in law divested himself of this property and divested himself of all right to possess, control, sell, transfer, will or otherwise use or dispose of it, except as he had already disposed of it, there was no scheme and no ingenuity of any kind, but an open, out-and-out determination to dispose of the property and vest it in others.

The court refers to a possible Federal inheritance tax as being one of the things which actuated this conveyance, but no Federal inheritance tax was pased until three years later, and we hardly feel that an instrument should be held illegal because the grantor believed that at some future time a Federal inheritance tax might be placed upon the devolution of property. It strikes us that if these motives which are supposed to have actuated the grantor have any effect, they

only have the effect of making it clear that the grantor intended to do exactly what he did do, namely, make an irrevocable transfer of the property, and under all the decisions this is fatal to the claim for a tax in this case. Such a transfer shows "not only an absence of testamentary intent, but an absolute hostility to such intent" (*Nichols vs. Emery*, 109 Cal., 323).

9. *The act does not tax transfers by will, descent, or deed effective before the act became effective.*

The opinion says:

> "The language of the statute manifests its purpose to tax all transfers which are accomplished by will or the intestate laws, and if it is made prior to death it can be classed as similar in nature and effect, because they accomplish a transfer of property under circumstances which impress on it characteristics of a devolution made at the time of the donor's death."

This statement is correct, provided it has in mind that the purpose of the act is to tax all transfers which are accomplished by will and certain classes of transfers *inter vivos* which are made *after the act becomes effective*. It is not intended to tax all transfers accomplished by will, but only transfers accomplished by will *becoming effective after the passage of the act*. It does not tax all transfers by the intestate laws, but only transfers by intestacy *occurring after the passage of the act*. It does not tax all transfers *inter vivos* of the character mentioned, *but only such as are made after the passage of the act*.

The court admits in its opinion that had the grantor died

testate or intestate between the enactment and the date of taking effect of the act in question no tax would accrue, but states that "the weakness of the appellants' position in this connection is that the property did not vest until after the statute became effective." The answer to this is that the legal title to the property and the estates created by the deed of trust did vest immediately upon the delivery of the deed of trust, which was before the statute became effective. The actual possession and enjoyment might not vest until after that time, but the same might be true in case of a will. Suppose the testator had died between the passage of the act and the date of its taking effect, leaving a will which gave the property to certain people for a length of time extending beyond the date of the taking effect of the act, and then created remainders which would take effect in possession and enjoyment thereafter. In that case it might be said that the weakness of the position of the remaindermen would be that the property did not vest in possession or enjoyment until after the statute became effective. But the answer would be that the taxability of the transfer, whether it be by will, intestate laws, or deed, does not depend upon when it takes effect *in possession or enjoyment*, but when it takes effect *in law*, and in the case of a will, as is just supposed, it is expressly held that although the estates do not vest in *possession or enjoyment* until after the effective date of the act, they are not taxable where they vest in law upon the death of the testator occurring before the effective date of the act.

(See authorities cited under Point I, *supra*.)

10. ***Taxes on transfers accrue at date of transfer, although not due till death.***

The court proceeds to state that a transfer tax accrues at the time of death, and in support of this cites the case of *Knolton vs. Moore*, 178 U. S., 56; 44 L. Ed., 976. That was a case involving an *inheritance* tax, and the court was there passing upon the validity of an inheritance tax and was stating the fundamental basis or generating source of such a tax, and in that connection it was stated that it was based upon the transmission of the property from the dead to the living. This is perfectly true of an *inheritance* tax, but it is not the basis of a tax on a transfer *inter vivos*. The right to tax a transfer *inter vivos* is based on the principle that no one has any right to create any particular estate in property, and the Legislature may impose as a condition on such creation an excise or transfer tax, *and with reference to such a tax it is expressly held that the law in effect at the time of the transfer is the law which must be looked to to determine the taxability of the property transferred.*

McClain vs. Penn Co., 108 Fed., 618;
Keeney vs. New York (1912), 222 U. S., 525; 56 L. Ed., 299.

Thus it was held in the last case that if the property was within the taxing State at the time of the transfer, it became impressed with the tax irrespective of where it was located at the time of the death of the grantor. It is perfectly obvious from a reading of the statute that immediately a transfer of the kind designated by the statute is made, the lien of the tax attaches to the property irrespective of when the tax may become payable.

XI.

Review of Second Decision of Supreme Court of Nevada.

In originally deciding this case, the court was confronted with two principles of law which seem to be so well settled as not to be subject to question, namely:

First, that acts of the legislature imposing taxes on transfers made in contemplation of death or intended to take effect in possession or enjoyment at or after death, are not to be construed to be retroactive so as to apply to transfers of that character, which become effective in law before the act takes effect, although possession and enjoyment take place after the act takes effect.

Second, if such acts are expressly made retroactive so as to apply to such transfers made before the acts became effective, the same are in violation of the State and Federal constitutions forbidding the taking of property without due process of law, and forbidding laws impairing the obligation of contracts.

(See cases cited in Point I, *supra*.)

In the original decision herein, the effect of these cases was attempted to be avoided in two ways: First, by holding that the deed in question was testamentary in character—that is, that it did not operate as a deed, but as a will—and, second, by holding that the deed was not effective as a deed because it could be revoked by the grantor dur-

ing his lifetime. In our petition for rehearing both of these propositions were attacked as being entirely without foundation. We pointed out in our petition for rehearing, that the contention that the instrument was not a deed but was testamentary in character and operated as a will was not only unsustained by the form of the instrument and by the acts of the parties under it, but was contrary to the pleadings in the cases, which admitted that it was a deed, and the judgment and findings, which found that it was a deed and that the grantees took title under it. As to the power of revocation, we pointed out that there was no power of revocation in the deed, and that under the general law and under law of California, where it was executed, no such power exists. The second opinion is written on the basis "conceding this to be true," and it is also written on the basis that it was unnecessary for the court to find "that said deed of trust is testamentary in character." It therefore remains to be seen whether there is any new ground stated in the opinion on rehearing. For that purpose we will briefly take up each paragraph of the opinion *seriatim*.

The first part of the opinion takes up the argument made by us, that the previous decision is in conflict with the well-established principles of comity between States. This argument was made by us entirely in connection with the construction and legal effect of the deed in question. We contended that the deed was made in California and by parties resident in California, and that therefore whether it was subject to revocation depended upon the law of California, and as to whether it was a deed or a will likewise depended upon the law of California (9 Cyc., 664). We

showed that by the law of California it was not subject to revocation, and that it was not testamentary in character. The court by its opinion entirely misapplies this argument. After the nature of this instrument is determined, the question whether it is taxable under the law of Nevada is a question to be determined by the statutes of Nevada. No one has ever pointed out anything in the law of Nevada that is in any way different from the law of California on this subject. There is no express statute in Nevada as to the revocability of a deed creating a trust, and, therefore, it must be subject to the general rule already shown that such deeds are not subject to revocation unless a power of revocation is reserved. We know of no law of that State which declares that a deed is not a deed, or that it does not take effect in law upon its delivery, nor do we know of any law of that State which holds that a deed made, executed, and delivered with respect to property which is simultaneously transferred to the grantees is a will and not a deed, and, therefore, the decisions of California that such an instrument is a deed and not a will and does create vested estates and is not subject to revocation are all merely general rules of law which should be reached in Nevada irrespective of any rule of comity, and certainly should be reached in this case in view of the rule of comity that, so far as the construction of instruments is concerned, they are to be construed according to the place where they are entered into. We never contended that the mere fact that a transfer is made outside of the State would exempt it from taxation.

The entire decision on the rehearing is simply to the effect that the transfer in question was made in contemplation of death, or intended to take effect in *possession or*

enjoyment at or after death. This is a proposition that has been admitted in every stage of the case. *It is also a proposition which has been admitted in all of the cases which we have cited above, and in all of which it was held that the transfer was not taxable, and in all of those cases the transfer was made before the act became effective, but the parties came into possession and enjoyment after the act became effective.* Still the court in the opinion on rehearing states:

> "It is this well-recognized principle that distinguishes the case at bar from that of *Hunt vs. Wicht*, 174 Cal., 205; 162 Pac., 634; L. R. A., 1917, c. 961."

As a matter of fact, in *Hunt vs. Wicht*, the matter arose on demurrer and the pleading alleged—

> "that said deed was made, executed and delivered by said decedent, as aforesaid, in contemplation of his death and without valuable consideration, and that the same was intended to take effect in possession and enjoyment as to the grantee therein named, respondent herein, after the death of said grantor."

It was with this allegation, which was admitted by the demurrer, that the court decided that no tax was due for the reason that the deed was made before the passage of the act. It is equally clear in that case that the grantee did not come into possession and enjoyment of the property until after the death of the grantor, for in that case the deed was delivered in escrow—

> "to be delivered to the grantee therein named * * * upon the death of said William Garms,"

the grantor. The grantor did not die until April 13, 1913, which was long after the passage of the Inheritance Tax Act of 1911, so that in that case the identical situation was presented that is presented here, namely, a deed which took effect *in law* immediately upon the delivery in escrow, but which did not take effect *in possession or enjoyment* until after the death of the grantor. At the time of the execution and delivery of the deed in escrow there was no act in effect imposing the tax, but at the time of the death there was such an act. In regard to this matter, the Supreme Court of California said:

> "So far as the statement herein contained as to the intention of the grantor with regard to the taking effect of the deed is concerned, it must necessarily be limited to his intention as to the mere actual possession and enjoyment of the property conveyed incidental to the ownership of a life estate therein, and cannot be taken as alleging an intention that title to the property should not immediately pass to the grantee upon the delivery of the deed in escrow. Otherwise we would have no operative transfer at all, and consequently nothing whatever upon which to base this claim for a tax. * * * It is immaterial, so far as the question we have discussed is concerned, that it is alleged that the transfer was made 'in contemplation of his death and without valuable consideration.' The estate conveyed fully vested at the time of the delivery of the deed in escrow, entirely regardless of the motives of the grantor for the conveyance, and without regard to whether the transfer was without valuable consideration, and there was then no law imposing a tax on any such transfer."

It will therefore be seen that in that case the very situation existed which exists in this case and which the Nevada court says distinguishes that case from the case at bar. In the case at bar the petition alleges the conveyance, and so it did in the *Wicht* case. In the case at bar it alleges that it was made in contemplation of death, and was intended to take effect in *possession or enjoyment* at or after death, and so it was alleged in the *Wicht* case. In the *Wicht* case it was held that, notwithstanding this, the transfer was *in law* complete when the deed was delivered, and that it was not taxable under an act subsequently passed, *although the grantee thereafter came into possession and enjoyment of the estate created.*

In the same way, in considering the case of *Nickel vs. State of California* (1918), 179 Cal., 126; 175 Pac., 641, the Nevada court says:

> "It is true the court held the complaint in that case was good as against the demurrer, but it is inferable from the order and what is said by the court in its opinion that it would be entirely proper and permissible for the State of California, upon issue joined, to show as a matter of fact that the instrument (being the same as that involved in both of these cases) was made 'in contemplation of death' and was not made for a 'valuable and adequate consideration,' and liable to a tax under the statute of California (Stats., 1911, p. 713, sec. 1, sub. 3)."

No one has ever contended that it would not be proper and permissible to show that the transfer was made in contemplation of death, and no one has ever contended that if it was made in contemplation of death it would not be liable for a

tax under the statute of California of 1911. That statute was passed two years *before* this deed was executed.

In *Nickel vs. State of California, supra*, the action was to quiet title against the claim of the State to a tax under the acts of 1913 and 1915, which were passed *after* this transfer. While it is true the matter arose on demurrer, the complaint set up the deed in full, and, of course, it appears on its face that it was not to take effect *in possession or enjoyment* as to the beneficiaries therein other than Henry Miller until after the death of the grantor, and the court held that it was not subject to the acts passed *after* the transfer. We did not cite the case of *Nickel vs. State of California* as authority for the proposition that this transfer is not taxable, but we did cite it as authority for the proposition that it is not taxable under acts which became effective after its execution. It is taxable under the act of 1911 because that act was in force before the date of the deed. The Nevada court also says:

> "Our attention has not been directed to any decision of our sister State, or that of any other jurisdiction that goes to the extent of holding that it is not permissible, for the purpose of claiming an inheritance tax, to attack a transfer and show by extrinsic proof that an instrument of conveyance is subject to the lien of such a tax."

There is no doubt that it is permissible by extrinsic evidence to show that a transfer was made in contemplation of death, and to thus bring it within the class of transfers referred to by the act, and no one has ever contended to the contrary. But if there was no inheritance-tax act in existence, it would not make the transfer subject to a tax by its

quiring extrinsic evidence that the transfer was made in contemplation of death, and so proof that a transfer was made in contemplation of death would not make it subject to a tax under an act which was not in force at the time of the transfer. The case is exactly the same as if an act taxed all gifts. It would certainly be competent to introduce extrinsic evidence to ascertain whether or not a particular transfer was a gift, and, if it was, it would be subject to the tax under an act in force at the time of the gift. But that would not make it taxable under some act passed ten years later. In other words, evidence showing that the transfer is the character denominated by the act does not make it taxable, unless the transfer took effect while the act was in force. If an act forbids the drinking of alcoholic liquor, extrinsic evidence could be introduced for the purpose of showing that the liquor was alcoholic and thus within the language of the act, but that would not serve to make out a crime if the offense was committed before the act became effective.

The court further says:

> "We concede that if upon any reasonable hypothesis we could bring ourselves to the conclusion that as a matter of law the title to the specific shares of stock vested absolutely in the trustees before the act became effective,"

this would make all other inquiries immaterial.

This is really all that there is in this case. The deed of trust transferred these shares in writing; the owner endorsed them and delivered them and they were canceled on the books of the company and new shares issued for them; they were transferred upon legal and lawful trusts with no power

of revocation. The complaint in this case alleges that they were transferred by the execution of the deed; the findings are that they were endorsed, assigned, transferred, and delivered at the date of the deed, and the judgment finds that the trustees under the deed are the owners of the property under the deed.

The court, however, makes the following suggestion:

> "Where it is a question of fact to be determined by the trial court from the nature and character of the conveyance and from all the circumstances surrounding its execution whether the property passed, the motive and the intent of the grantor and the *bona fides* of the transaction are material elements to be considered in determining whether the transfer is taxable."

As to whether property passes by a deed is a question, not of fact, but of law, after the deed is established. In this case the deed is not only established by the pleadings which admit it, by the findings which find it, and the judgment which adjudges it, but also by the proof of the execution and delivery of it. Whatever motive and intent the grantor had, there is no doubt that he had the motive and intent to make the deed, and so far as the "*bona fides*" of the transaction are concerned, there is no evidence, pleading or finding that it was anything else but a *bona fide* transfer of the property. There is no finding that it was not actually made and made in good faith. The court is apparently viewing the matter as if there was some issue as to whether the deed was made, executed, and delivered, but the evidence and findings and judgment are conclusive that it was made, executed, and delivered.

So we say in the last analysis this case must be stripped of all of these questions as to the testamentary character of the instrument, because it was not testamentary, the revocability, because it was not revocable, the motive of the grantor, because immaterial, and we then come down to the one proposition of law, namely, admitting that the transfer was made to take effect *in possession or enjoyment* at or after death, still it took effect *in law* immediately upon its execution, and therefore is not subject to an act which was not in force at its date.

In every case cited by us it was also admitted that the transfer was made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, and still the transfers were held not taxable because the act was passed after the transfer and before the coming into possession. This has been decided by the supreme courts of New York, North Carolina, California, Illinois, Iowa, Kentucky, Louisiana, Massachusetts, Maine, Maryland, Michigan, Minnesota, New Hampshire, Ohio, and Virginia.

(See cases cited by us under Point I, *supra*.)

Notwithstanding this array of judicial decisions, the court in rehearing says:

> "It is the vesting of the property in possession and the enjoyment of the same upon the death of the grantor, and after the statute took effect, that renders it liable to the tax; and both of these things happened in this case. *Crocker vs. Shaw*, 54 N. E., 549; *In re Green's Estate*, 149 N. Y., 69; 41 N. E., 401; Inheritance Tax (Gleason and Otis), 90-91."

A review of the cases cited will show that they in no way support the decision herein.

The facts involved in the case of *Crocker vs. Shaw*, were these: Mrs. Frances Ladd transferred property to a trustee in trust to pay her the net income during life, and upon her death

> "to convey and transfer the principal to such persons as she should appoint by her last will."

Many years later she died, leaving a will in which she exercised this power of appointment. Intermediate the transfer and her death, the taxing law was passed. It will be noted that Mrs. Ladd was (*a*) the owner of the property transferred, and, as such, was possessed of all interests in the property not conveyed to the trustee; (*b*) the creator and the beneficiary of the trust; (*c*) the donor and the donee of the power of appointment, and (*d*) the one person interested in the execution of the trust, and, as such, entitled to apply to a court of equity for the termination thereof up to the time of her death. The deed of trust created no remainders, but it was left to Mrs. Ladd to create the remainder and to nominate the remaindermen by her will, effective at her death—which occurred after the taxing law was passed. There was no one who had any vested interest in any of the remainder until the power of appointment was effectually exercised, and since it was exercised by will it was not effectually exercised until the will took effect upon her death, which was after the taxing law. It was this circumstance which caused the court to describe the case as one

> "where the deed was made before it (the taxing law) went into effect, although the property vested after that event."

In other words, there was no vested estate of any kind in any one until the power of appointment was exercised, and it was exercised after the law was passed, and it was the exercise of that power that transferred or granted the estates in remainder, and, therefore, they were held by the court to be subject to taxation.

The marked difference between that case and this is obvious. Here estates in remainder were irrevocably created by the instrument, which was made before the taxing law became effective.

The next case cited, *In re Green's Estate*, involved certain transfers made by Mrs. Green in 1889 and years following, whereby she reserved the income for life, with remainders over to named nieces. *All of the transfers were made while there was a transfer-tax law in force in New York, namely, the acts of June 30, 1885, and June 25, 1887*, and all that was held was that that form of transfer was a transfer made or intended to take effect in possession or enjoyment after the death of the grantor, and therefore taxable under a law *in force at the time of the transfer*. This proposition is not disputed, but the case is no authority for the proposition that such a transfer is taxable *under an act not in force at that time*.

The third case relied upon, *Matter of Seaman*, so far as the point decided is concerned, is entirely in our favor. In that case Seaman died in 1876, leaving a will by which he created certain life estates and remainders. The remaindermen did not come into possession of these remainders until 1893, and in the meantime an inheritance and transfer tax act had been passed. The court held that they were *not* so tax-

able. This decision, however, was based on the conception that the only transfers taxable were transfers technically *causa mortis;* that is, transfers made by a person *in extremis* and *ipso facto* revoked by the recovery of the donor. The court did say by way of dictum with respect to that character of transfer that the Legislature might constitutionally tax it by an act passed after the transfer and before the death. Of course, the transfer here involved was not such a transfer. However that may be, the language of the court was entirely dictum, and when the matter was presented to the highest court of New York with respect to transfers made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, it was held, as we have already pointed out, that they could not be constitutionally taxed by such an act.

In re Pell (1902), 171 N. Y., 48; 63 N. E., 789.

These are the only cases cited by the court in support of its decision of this case, and it therefore results that the decisions of the highest courts of New York, North Carolina, Virginia, Iowa, Kentucky, Massachusetts, New Hampshire, Ohio, California, Maryland, Michigan, Maine, Illinois, and Louisiana, all of which directly hold that such a conveyance cannot be so taxed, are entirely disregarded and the decision herein based on one case (*Crocker vs. Shaw*) which has to do entirely with a power of appointment reserved and exercised by will *after the passage of the law;* one case (*Green's estate*) which did not involve the question at all, because the act was in force before the transfer, and one case (*Seaman's estate*) in which it was held that the transfer involved was not taxable, but which contained a dictum regarding transfers

technically *causa mortis*, not involved herein, and which was rendered in a State which has time and again held that transfers of the kind herein involved are not taxable under acts becoming effective after the transfer and before the parties come into possession and enjoyment.

In view of the repeated insistence of the Nevada court that this case is in some way differentiated from the numerous cases cited by us, we wish to reiterate that in every one of those cases it was admitted or established that the transfer was made in contemplation of death, or intended to take effect in possession or enjoyment at or after death, and would have been taxable if the act had been in force at the time of the transfer, and that in all of those cases the party came into possession and enjoyment after the act did become effective, and still in all of them it was held that the transfer was not taxable.

We respectfully submit that the judgments under review should be reversed.

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APPENDIX A.

The Nevada Inheritance Tax Act.

(Statutes of Nevada, 1913, Chapter 266.)

CHAP. 266—*An act to provide revenue for the support of the government of the State of Nevada, to establish a tax on gifts, legacies, inheritances, bequests, devises, successions, and transfers, to provide for its collection and to direct the disposition of its proceeds, to provide for the enforcement of liens created by this act, and for suits to quiet title against claims of lien arising hereunder.*

[Approved March 26, 1913.]

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

SECTION 1. A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this State, and any interest therein or income therefrom, whether belonging to the inhabitants of this State or not, and whether tangible or intangible, not hereinafter exempted, which shall pass in trust or otherwise by will or by the statutes of inheritance of this or any other State or by deed, grant, sale, or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor, or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act. For the purposes of this act, the ownership of shares of stock in a corporation owning property in this State shall be considered as the ownership of such interest in the property so owned by such corporation, as the number of shares so owned shall bear to the entire issued and outstanding capital stock of such corporation; and notes and other

evidences of indebtedness secured by mortgage on real estate situated in this State are and shall be, upon the owners' death, subject to the inheritance tax hereinafter provided.

SEC. 2. When the property or any interest therein or income therefrom so passed or transferred exceeds in value the exemption hereinafter specified and shall not exceed in value the sum of twenty-five thousand dollars, the tax hereby imposed shall be:

(1) Where the person or persons entitled to any beneficial interest in such property shall be the husband, wife, lineal issue of lineal ancestor of the decedent, or any child adopted as such in conformity with the laws of this State, or any child to whom such decedent for not less than ten years prior to such transfer stood in the mutually acknowledged relation of a parent; *provided, however,* such relationship began at or before the child's fifteenth birthday and was continuous for said ten years thereafter, or any lineal issue of such adopted or mutually acknowledged child, at the rate of 1 per centum of the clear value of such interest in such property.

(2) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister or a descendant of a brother or sister of the decedent, a wife or widow of a son, or the husband of a daughter of the decedent, at the rate of 2 per centum of the clear value of such interest in such property.

(3) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother [of] or a descendant of a brother or sister of the father or mother of the decedent, at the rate of 3 per centum of the clear value of such interest in such property.

(4) Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother or a descendant of the brother

or sister of the grandfather or grandmother of the decedent, at the rate of 4 per centum of the clear value of such interest in such property.

(5) Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than that hereinbefore stated; or shall be a stranger in blood to the decedent, or shall be a body politic or corporate, at the rate of 5 per centum of the clear value of such interest in such property.

SEC. 3. The foregoing rates in section 2 are for convenience termed the primary rates. When the market value of such property or interest exceeds twenty-five thousand dollars, the rates or tax upon such excess shall be as follows:

(1) Upon all in excess of $25,000 and up to $50,000, two times the primary rates.

(2) Upon all in excess of $50,000 and up to $100,000, three times the primary rates.

(3) Upon all in excess of $100,000 and up to $500,000, four times the primary rates.

(4) Upon all in excess of $500,000, five times the primary rates.

SEC. 4. The following exemptions from the tax are hereby allowed:

(1) Property of the clear value of twenty thousand dollars transferred to the widow or to a minor child of the decedent, and of ten thousand dollars transferred to each of the other persons described in the first subdivision of section 2 shall be exempt.

(2) Property of the clear value of ten thousand dollars transferred to any or all of the persons described in the second subdivision of section 2 shall be exempt.

(3) Property of the clear value of five thousand dollars transferred to any or all of the persons described in the third subdivision of section 2 shall be exempt.

(4) No exemption shall be allowed upon property transferred to any of the persons described in the fourth and fifth subdivisions of section 2 of this act.

SEC. 5. When any grant, gift, legacy, devise or succession upon which a tax is imposed by section 1 of this act shall be an estate, income or interest for a term of years, or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported or of which it is a part shall be appraised immediately after the death of the decedent, and the market value thereof determined, in the manner provided in section 17 of this act, and the tax prescribed by this act shall be immediately due and payable to the treasurer of the proper county, and together with the interest thereon, shall be and remain a lien on said property until the same is paid: *provided*, that the person or persons or body politic or corporate beneficially interested in the property chargeable with said tax may elect not to pay the same until they shall come into the actual possession or enjoyment of such property; and in that case such person or persons or body politic or corporate shall execute a bond to the State of Nevada, in a penalty of twice the amount of the tax arising upon personal estate, with such sureties as the district court having jurisdiction as hereinafter provided may approve, conditioned for the payment of said tax and interest thereon, at such time or period as they or their representatives may come into the actual possession or enjoyment of such property, which bond shall be filed in the office of the county clerk of the proper county and a certified copy thereof shall be immediately transmitted to the State controller; *provided further*, that such person shall make a full and verified return of such

property to said court and file the same in the office of the county clerk within one year from the death of the decedent and within that period enter into such security and renew the same every five years.

SEC. 6. Whenever a decedent appoints or names one or more executors or trustees and makes a bequest or devise of property to them in lieu of commissions or allowances, which otherwise would be liable to said tax, or appoints them his residuary legatees, and said bequest, devises or residuary legacies exceed what would be a reasonable compensation for their services, such excess over and above the exemption herein provided for shall be liable to said tax; and the district court in which the probate proceedings are pending shall fix the compensation.

SEC. 7. All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months no interest shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per centum per annum shall be charged and collected from the time said tax accrued; *provided*, that if said tax is paid within six months from the accruing thereof a discount of 5 per centum shall be allowed and deducted from said tax. And in all cases where the executors, administrators or trustees do not pay such tax within eighteen months from the death of the decedent, they shall be required to give a bond in the form and to the effect prescribed in section 5 of this act for the payment of said tax, together with interest.

SEC. 8. The penalty of 10 per centum per annum imposed by section 7 hereof, for the nonpayment of said tax, shall not be charged in cases where in the judgment of the court, by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of

eighteen months from the death of the decedent; and in such cases 7 per centum per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed, after which 10 per centum interest per annum shall again be charged until the tax is paid; but litigation to defeat the payment of the tax shall not be considered necessary litigation.

SEC. 9. Any administrator, executor or trustee having in charge or trust any legacy or property subject to the said tax shall deduct the tax therefrom, or, if the legacy or property be not money, he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid. If, however, such legacy be given in money to any person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount, but if it be not in money, he shall make application to the district court to make an apportionment, if the case require it, of the sum to be paid into his hands by such legatees and for such further order relative thereto as the case may require.

SEC. 10. All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said tax, in the same manner as they may be enabled by law to do for the payment of the debts of the estate, and the amount of said tax shall be paid as hereinafter directed. No final settlement of the account of any executor, administrator or trustee shall be accepted or allowed unless it shall show, and the court shall find, that all taxes imposed by the provisions of this act upon

any property or interest therein or income therefrom belonging to the estate to be paid by such executor, administrator or trustee and to be settled by said account, shall have been paid, and the receipt of the county treasurer of the county in which such estate is being administered shall be the proper voucher for such payment.

SEC. 11. Every sum of money retained by an executor, administrator or trustee, or paid into his hands for any tax on property, shall be paid by him within thirty days thereafter to the treasurer of the county in which the probate proceedings are pending. Upon the payment to any county treasurer of any tax due under this act, such treasurer shall issue a receipt therefor in triplicate, one copy of which he shall deliver to the person paying the said tax, and the original and one copy thereof he shall immediately send to the controller of the State, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall retain one of said receipts and the other he shall countersign and seal with the seal of his office and immediately transmit the same to the clerk of the court where the proceedings are pending. Any person shall, upon payment to the county treasurer of the sum of fifty cents, be entitled to a duplicate, or copy, of any receipt that may have been given by said treasurer for the payment of any tax under this act.

SEC. 12. Whenever any debts shall be proven against the estate of a decedent after the payment of legacies or distribution of property from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator or trustee, if the said tax has not been paid to the county treasurer, or to the State treasurer, or by said county treasurer, or state treasurer (on warrant of the county auditor or the State controller) if it has been so paid.

SEC. 13. If a foreign executor, administrator or trustee shall assign or transfer any stock, obligations, securities, deposits or other assets in this State, standing in the name of a decedent, or in trust for a decedent, and liable to the tax hereby imposed, such tax shall be paid to the treasurer of the proper court, on the transfer of such stock, obligations, securities, deposits or other assets, and if such tax be not paid or secured to be paid at the time of such transfer, both the transferrer and the transferee shall be personally liable for the amount of such tax.

SEC. 14. The district court having either principal or ancillary jurisdiction of the settlement of the estate of any decedent leaving property subject to the tax hereby imposed, shall have jurisdiction to hear and determine all questions in relation to said tax, or that may arise affecting any devise, legacy or inheritance, or any grant or gift, under this act, subject to appeal as in other cases, and the State controller shall in his name of office represent the interests of the State in any such proceedings.

SEC. 15. In each county of this State the district judge or judges shall, whenever he or they deem advisable, appoint three competent residents and free-holders of said county to act as appraisers of all property within such county, which is charged or sought to be charged with an inheritance tax. Said appraisers shall serve during the pleasure of the court and until discharged by order thereof. They shall each take the constitutional oath of the State of Nevada, but shall not be required to give a bond; they shall be subject to removal at any time in the discretion of the court, and the court, or judge thereof, in vacation may also in its discretion, either before or after the appointment of regular appraisers, appoint other appraisers to act in any given case; vacancies shall be filled by appointment of the court or by the judge thereof. Every such inheritance tax appraiser shall be paid by the county treasurer on a warrant drawn by the county auditor

out of any fund which he may have in his hands not otherwise appropriated by law, on presentation of an order or certificate of the district court, showing an allowance of his claim as such appraiser. Such compensation shall be at the rate of five dollars per day for each appraiser for every day actually and necessarily employed in said inheritance tax appraisement, together with their actual and necessary traveling expenses and the fees paid such witnesses as shall have been subpœnaed before them, which fees shall be the same as those now provided for witnesses attending a court of record.

SEC. 16. Any appraiser appointed under this act who shall take any fee or reward from any executor, administrator, trustee, legatee, next of kin or heir of any decedent, or from any other person liable to pay said tax or any portion thereof, or from any agent or representative of any such person, shall be guilty of a misdemeanor, and upon conviction in any court having jurisdiction of misdemeanors he shall be punished by fine or imprisonment or both, and in addition thereto the judge shall dismiss him from such service.

SEC. 17. The district court having jurisdiction to determine any such tax, either upon its own motion or upon the application of any interested person, including the State controller or county treasurer, shall by order direct the person, or one of the persons, appointed pursuant to section 15 of this act, to fix the clear market value of property of persons whose estates shall be subject to the payment of any tax under this act. Such appraisers shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the State controller and the treasurer of the county in which such tax is to be paid, and to such person or persons as the district court may by order direct, of the time when and place where they will hear all persons interested in the appraisement of such estate. At the time and place specified in such notice, the said appraisers

shall meet and appraise the said property at its fair market value; and for the purpose of making said appraisement, the said appraisers shall be authorized to cause the clerk to issue subpœnas and compel the attendance of witnesses before them, to administer oaths and to take the evidence of such witnesses under oath concerning such property and the value thereof; and shall make report thereof and of such value in writing to the said district court, together with the depositions of the witnesses examined, if any, and such other facts in relation thereto as said district court may order or require, within thirty days from the date of such direction unless further time be granted by the court.

SEC. 18. Whenever, by reason of the complicated nature of the estate, or by reason of the confused condition of the decedent's affairs, it is impracticable for the appraisers to file with the clerk of the court a full, true and correct appraisement of the personal assets belonging to the estate within the time required by this act, the court may extend the time for making such appraisement, not exceeding a period of three months.

SEC. 19. The State controller or any person interested in the estate appraised may, within twenty days thereafter, file objections to said appraisement, on the hearing of which as an action in equity, either party may produce evidence competent or material to the matters therein involved. If upon such hearing the court finds the amount at which the property is appraised is at its value on the market in the ordinary course of trade, and that the appraisement was fairly and in good faith made, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or less sum than the value of the property in the ordinary course of trade, or that the same was not fairly or in good faith made, may order the appraisement amended or corrected to conform to its findings, or it shall set aside the appraisement of the property, appoint new appraisers, and so proceed until a

fair and good appraisement is made. The State controller or any one interested in the property appraised may appeal to the supreme court from the order of the district court approving, amending or correcting, or setting aside any appraisement to which exceptions have been filed. Notice of appeal shall be served within thirty days from the date of the order appealed from, and the appeal shall be perfected in the time now provided for appeals in civil actions. In case of appeal, the appellant, if he is not the State controller, shall give bond to be approved by the clerk of the court, to pay the tax, which bond shall provide that the said appellant and sureties shall pay the amount of the tax for which the property may be liable with cost of appeal. If upon the hearing of objections to the appraisement, the court finds that the property is not subject to tax, the court shall, upon the expiration of time for appeal, when no appeal has been taken, order the clerk to enter on his probate docket and in the minutes of the court, a cancelation of any claim or lien for tax. If at the end of twenty days, from the filing of the appraisement with the clerk, no objections are filed, the appraisement shall stand approved.

SEC. 20. If it shall appear to the district court upon petition of the State controller, or the county treasurer, or any citizen or other interested person that any transfer has been made within the meaning of this act, and the taxability thereof and the liability for such tax and the amount thereof have not been determined, and no proceedings are pending in any court in this State wherein the taxability of such transfer, the liability therefor and the amount thereof may be determined, said court shall issue a citation, citing the persons who may appear liable therefor, or known to own any interest in or part of the property transferred, to appear before the court on a day certain, not more than twenty days from the date of such citation, and show cause why said tax should not be determined and paid. The clerk of the court shall upon the request of the State controller or the treasurer

of the county furnish, without fee, one or more of transcripts of such decree or order and the same may be docketed and filed by the county clerk of any county in the State without fee. The district court may hear the said cause upon the relation of the parties and the testimony of witnesses and evidence produced in open court, and if the court shall find said property is not subject to any tax as herein provided, the court shall, by its order so determine; but if it shall appear that said property, or any part thereof, is subject to any such tax, the same shall be appraised and taxed as in other cases and an appeal from such order or decree shall be allowed as provided in section 19 of this act.

SEC. 21. In all cases, all orders, decrees and proceedings shall be entered by the clerk of the district court in the probate register and all orders, judgments or decrees establishing liens upon property shall be docketed by the clerk as other judgment liens are docketed.

SEC. 22. It shall be the duty of each clerk of the district court to make an examination from time to time of all reports filed with him by administrators, executors, and trustees, and also to make examination of all foreign wills offered for probate or recorded within his county, and to notify the district attorney of such county of any property coming to his knowledge subject to the tax hereby imposed. It shall be the duty of each county recorder to examine from time to time the record of deeds and conveyances filed or recorded in his office, and report to the district attorney any transfers or conveyances of property coming to his knowledge subject to the tax herein provided. It shall be the duty of the district attorney from time to time to examine the probate records and proceedings in the office of the clerk of his county, and conveyances or transfers filed in the office of the county recorder, and if from such examination or from information or knowledge coming to him from any other source, he finds or believes that any property within his county or within the jurisdiction of the district court of said county, has passed

by will or the intestate laws of this or any other State, or by deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the decedent, donor, or grantor, he shall make report thereof in writing to the State controller embodying in such report the name and residence of the decedent, date of death, name and address of the administrator, executor, or trustee, the description of any property liable to a tax and the county in which it is located and the name and relationship of all beneficiaries or heirs. Any citizen of the State having knowledge of property liable to such tax, against which no proceedings for enforcing the collection thereof are pending, may report the same to the district attorney of his county or the State controller and it shall be the duty of such officers to investigate the case and if such officers or either of them, shall have reason to believe that any property is liable to the tax hereby imposed he shall forthwith institute proceedings for the recovery of the same as provided in section 20 of this act.

SEC. 23. In all cases where any property so passes as to be liable to taxation under this act, all costs of the proceedings had for the determination of the amount of such tax or for determining whether the property of the entire estate is sufficient in amount to render that part passing to the heirs, devisees, legatees, grantees, or transferees, subject to the tax, shall be chargeable to such estate or the owners of the property transferred and to discharge the lien upon such property, all costs as well as the taxes must be paid. In all other cases the costs are to be paid as ordered by the court, and when a decision adverse to the State has been rendered with an order that the State pay the costs, it shall be the duty of the clerk of the court in which such action was pending, to certify the amount of such costs to the State treasurer, together with a copy of such judgment or order, and the State treasurer shall, if such costs be correctly certified and the case has been finally determined, present the claim to the State board of examiners which they shall, if found correct,

audit, allow, and pay as other claims against the State are audited, allowed, and paid.

SEC. 24. Whenever any property belonging to a foreign estate, which estate, in whole or in part, is liable to pay an inheritance tax in this State, the said tax shall be assessed upon the market value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this State; in the event that the executor, administrator, or trustee of such foreign estate, files with the clerk of the court having ancillary jurisdiction, and with the State treasurer, duly certified statements exhibiting the true market value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statements shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of said estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this State bears to the value of the entire estate.

SEC. 25. If a foreign administrator, executor, or trustee shall assign or transfer any corporate stock or obligations in this State standing in the name of the decedent, or in trust for a decedent and liable to the tax herein provided, the tax must be paid to the county treasurer of the county in which such transfer is made before the transfer thereof; otherwise the corporation permitting its stock to be so transferred shall be liable to pay such tax, and it is the duty of the State controller and the district attorney of the proper county to enforce the payment thereof.

SEC. 26. Whenever an estate charged, or sought to be charged, with the payment of an inheritance tax, is of such a nature or so disposed that the liability of the estate is doubtful, or the value thereon, but all such settlements, compromises, and compositions shall be approved by the district

court of the proper county, and after such approval the payment of the amount of the tax so agreed upon shall discharge the lien against the property of the estate.

[Sec. 27 does not appear in enrolled bill—State Printer.]

SEC. 28. All taxes levied and collected in pursuance of the provisions of this act shall be apportioned as follows: Twenty per cent thereof shall be paid to the county treasurer of the county in which such tax is paid or collected, and shall be placed in the general fund of such county; forty per cent of such tax shall be paid to the State treasurer and placed in the State school fund; and forty per cent of such tax shall be paid to the State treasurer and placed in the general fund of the State.

SEC. 29. If, after the expiration of eighteen months from the accrual of any tax under this act, such tax shall remain due and unpaid, after the refusal or neglect of the persons liable therefor to pay the same, the county treasurer shall notify, or the State controller may notify, the district attorney of the county in writing of such failure or neglect, and such district attorney shall bring and prosecute an action or actions in the name of the State as plaintiff, for the recovery of such tax and for the purpose of enforcing any lien or liens against all and any of the property subject thereto. In any such action the owner of any property or of any interest in property against which the lien of any such tax is sought to be enforced, and any predecessor in interest of any such owner whose title or interest was deraigned through any such decedent by will or succession or by decree of distribution of the estate of such decedent, and any lienor, or incumbrancer subsequent to the lien of such tax may be made a party defendant. The enumeration in this section of the persons who may be made defendants shall not be deemed to be exclusion, but the joinder or non-joinder of parties, except when otherwise herein provided, shall be governed by the [rules] in equity in similar cases.

(*a*) Actions may be brought against the State for the purpose of quieting the title to any property, against the lien or claim of lien of any tax or taxes under this act, or for the purpose of having it determined that any property is not subject to any lien for taxes under this act. In any such action, the plaintiff may be any administrator or executor of the estate or will of any decedent, whether the said estate shall have been fully administered and the estate settled and closed or not, and any heir, legatee, or devisee of any such decedent, or trustee of the estate or of any part of the estate of such decedent, or distributee of the estate or of any part of the estate of any such decedent, and any assignee, grantee, or successor in interest of such persons, and all or any persons who might be made parties defendant in any action brought by the State under the provisions of this section, and notwithstanding that all or any of the persons enumerated in this section shall or may have assigned, granted, conveyed, or otherwise parted with all or any interest in or title to the property, or any thereof, involved in any such claim of lien before the commencement of such action. All or any of the persons in this action enumerated may be joined or united as parties plaintiff. The enumeration in this section of the persons who may be made parties shall not be deemed to be exclusive, but the joinder or non-joinder of parties, except when otherwise herein provided, shall be governed by the rules in equity in similar cases. In all cases any person who might properly be a party plaintiff in any such action who refuses to join as plaintiff may be made a defendant.

(*b*) All actions under this section shall be commenced in the district court of the county in which is situated any part of any real property against which any lien is sought to be enforced, or to which title is sought to be quieted against any lien, or claim of lien; but if in said action no lien against real property is sought to be enforced, the action shall be brought in the district court of the county which has or which had jurisdiction of the administration of the estate of the decedent mentioned herein.

(c) Service of summons in the actions brought against the State shall be made on the controller of State and on the district attorney of the county in which the estate of the decedent mentioned herein is being administered, or has been administered in probate proceedings, and it shall be the duty of said district attorney to defend all such actions.

(d) The procedure and practice in all actions brought under this section, except as otherwise provided in this act, shall be governed by the provisions of the civil practice act of this State, in so far as the same shall or may be applicable, including all provisions relating to motions for new trials and appeals.

(e) The remedies provided in this section shall be in addition to and not exclusive of any remedies provided in the sections preceding this section.

SEC. 30. The words "estate" and "property" as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainer, vendor, or donor passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the State. The word "transfer" as used in this act shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described. The word "decedent" as used in this act shall include the testator, intestate, grantor, bargainer, vendor, or donor.

The words "contemplation of death" as used in this act shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*, and it is hereby declared to be

the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.

SEC. 31. This act shall take effect thirty days from and after the date of its approval.

APPENDIX B.

Findings and Decree of the Superior Court of the State of California Affirmed on Appeal in Estate of Miller, Pac.

TRANSFER OF STOCK OF MILLER & LUX, INCORPORATED.

That on the 17th day of April, 1913, the said Henry Miller was the owner of 119,871.75 shares of the capital stock of Miller & Lux, Incorporated, a corporation duly organized and existing under and by virtue of the laws of the State of Nevada and doing business in the State of California and elsewhere, represented by the following certificates on the books of the said corporation, numbered, standing in the name of, and for the number of shares each, respectively, as follows:

Number of certificate.	Number of shares.	Standing in the name of
114	119,839.75	Henry Miller.
81	2	Henry Miller.
92	10	Frank B. Anderson.
112	10	C. Z. Merritt.
113	10	David Brown.

That said certificate No. 92 was then and there endorsed in blank by the said Frank B. Anderson; and that said certifi-

cate No. 112 was then and there endorsed in blank by the said C. Z. Merritt; and that said certificate No. 113 was then and there endorsed in blank by the said David Brown; and that on said day and date the said Henry Miller resided in the said City and County of San Francisco, State of California, and all of the said shares of stock in said corporation and the certificates evidencing the same were in his possession in the said City and County of San Francisco.

That at the said City and County of San Francisco, State of California, and on the said 17th day of April, 1913, the said Henry Miller made, executed, and delivered to the said Nellie Miller Nickel and J. Leroy Nickel, as trustees, a certain deed of trust, a true copy whereof is set forth in full in each of the said reports of the said Inheritance Tax Appraiser herein; and that thereupon and at the said City and County of San Francisco, and on the said 17th day of April, 1913, the said Henry Miller endorsed, assigned, transferred, and delivered the said 119,871.75 shares of stock of Miller & Lux, Incorporated, a corporation, to the said Nellie Miller Nickel and J. Leroy Nickel as trustees, and that thereafter and on the said 17th day of April, 1913, said certificate No. 114 for 119,839.75 shares of said stock was transferred on the books of the said corporation by the cancellation of said certificate No. 114 and the issuance to the said Nellie Miller Nickel and J. Leroy Nickel as such trustees of certificate No. 115 for said 119,839.75 shares; and said certificate No. 81 for said 2 shares, said certificate No. 92 for said 10 shares, said certificate No. 112 for said 10 shares, and said certificate No. 113 for said 10 shares, so endorsed as aforesaid were delivered by the said Henry Miller to the said Nellie Miller Nickel and J. Leroy Nickel, as such trustees, and the said trustees then and there accepted the said 119,871.75 shares of stock and the said certificates representing the same and accepted the said trust under the terms of the said deed of trust and the said Nellie Miller Nickel and the said J. Leroy Nickel on the said 17th day

of April, 1913, pursuant to the provisions, accepted the said trust by endorsement in writing upon the said deed of trust signed and acknowledged by each of them, a copy whereof is annexed to and made a part of the said deed of trust as aforesaid and is set forth in full in each of the said reports of the said Inheritance Tax Appraiser herein; that ever since the said 17th day of April, 1913, the said Nellie Miller Nickel and J. Leroy Nickel, as such trustees, have been and now are the owners of and in the possession of the said 119,871.75 shares of said stock and the whole thereof at the said City and County of San Francisco, State of California.

That the said deed of trust took effect immediately upon its execution and delivery and was intended by the said Henry Miller to take effect immediately upon its execution and delivery and the said trustees immediately became the owners of legal title of the said shares of stock, and the beneficiaries immediately became the owners of the equitable title thereto, and the estates created thereby immediately became vested property rights of the said trustees and beneficiaries; that the said transfer was made entirely in consideration of the love and affection of the said Henry Miller for said beneficiaries and the relationships which existed between him and the said beneficiaries; that the same was not made upon or for a valuable and adequate consideration within the meaning of the inheritance-tax act of 1911 hereinafter referred to; *that said Henry Miller did not reserve any power or right to revoke the said deed of trust, and the same was in law irrevocable;* that although said transfer took effect immediately upon the execution of said deed of trust, nevertheless the several beneficial interests created thereby other than the interest of the said Henry Miller took effect in possession and enjoyment at and after the death of the said Henry Miller; and the said transfer was intended by the said Henry Miller to so take effect in possession and enjoyment as to the beneficiaries other than said Henry Miller

at and after his death. At the time of the said transfer the said Henry Miller was of the age of eighty-six years and was in feeble health, but not in immediate fear of death; *that the said transfer was not a gift causa mortis, but was a gift inter vivos, and said deed of trust was not testamentary in character;* but the said transfer was made in contemplation of death within the meaning of the said inheritance tax act of 1911 hereinafter more particularly referred to as those words are defined in section 27 of said act, viz: 'The words "contemplation of death" as used in this act shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will and in no wise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis;* and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.' That the said transfer was made by the said Henry Miller in contemplation of his death within the meaning of the said Inheritance Tax Act of 1911 as thus defined; that it was admitted on the hearing and trial herein and in their said objections to said appraiser's reports by the said trustees and the said beneficiaries under the said deeds of trust, and the court

Finds, orders, adjudges, and decrees that the said transfer and each and all of the estates created thereby other than the life estate of the said Henry Miller are and each of the said estates is subject to the lien and claim of the State of California for a tax under the terms and provisions of that certain act of the legislature of the State of California, * * * approved April 7, 1911, *which said act was in force at the time the said deed of trust was executed and delivered as aforesaid.*

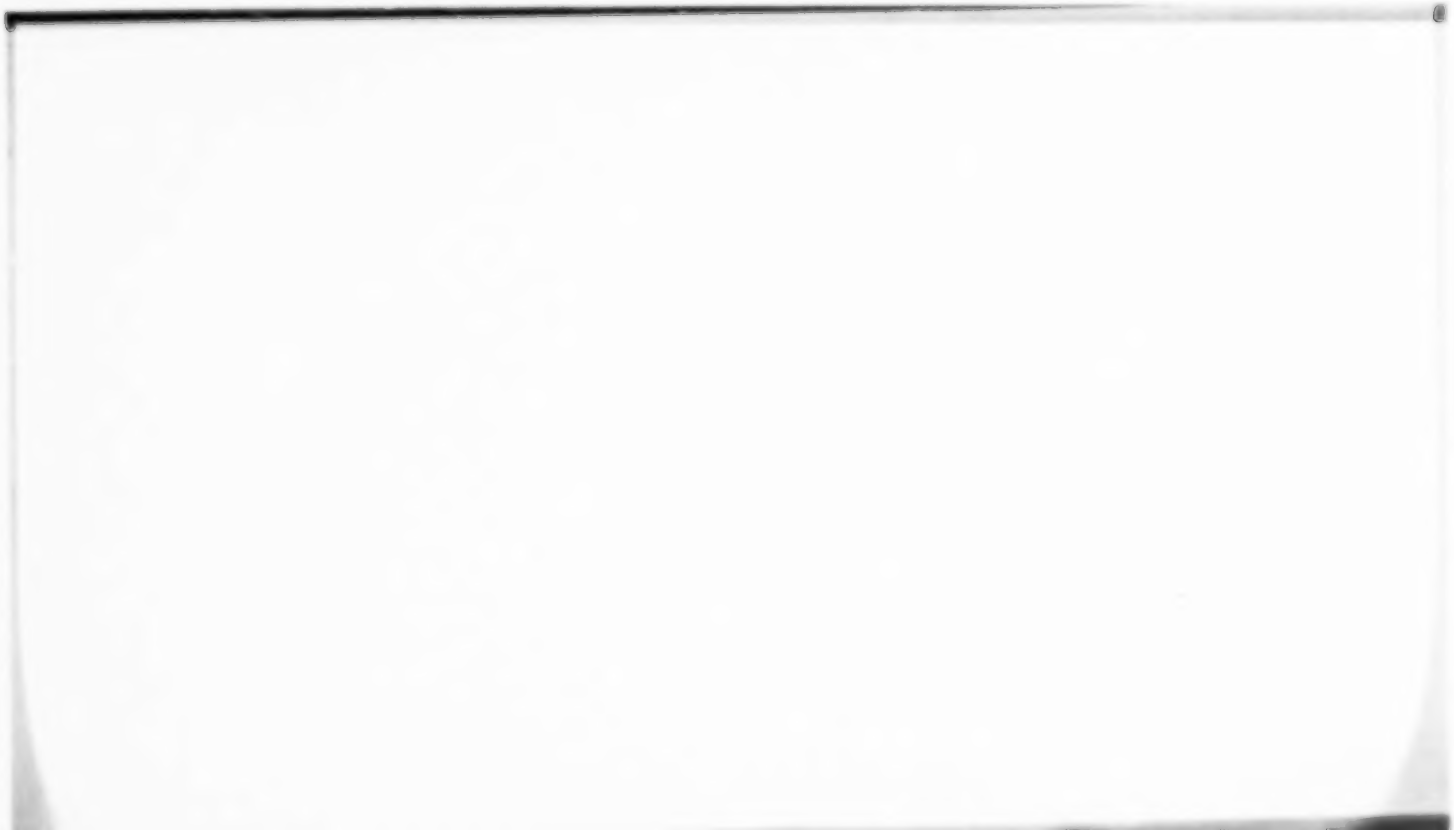
That the said transfer is not subject to any lien or claim for any inheritance or transfer tax under any other act of the

*legislature of the State of California, nor under any act of the State of California passed or going into effect after the date of the said transfer, and the said transfer is not subject to any lien or claim for any inheritance or transfer tax under that certain act of the legislature of the State of California, * * * approved June 15, 1911;*

*Nor is the said transfer subject to any lien or claim for an inheritance or transfer tax under that certain act of the legislature of the State of California, * * * approved June 16, 1913, approved May 10, 1915.*

* * * * * * *

And it is by the court ordered, adjudged, and decreed that the title of the said Nellie Miller Nickel and J. Leroy Nickel, *as trustees under said deed of trust dated April 17, 1913,* to all of said shares of capital stock of Miller & Lux, Incorporated, above set forth, be and the same hereby is quieted as against any claim of the State of California to an inheritance or transfer tax under said act approved June 16, 1913, and any claim of the State of California to an inheritance or transfer tax under said act approved May 10, 1915, and against all claim of the State of California to any inheritance or transfer tax thereon by reason of the said transfer thereof, other than the tax thereon as determined and imposed by the said act, approved April 7, 1911, which act was in force at the time of the said transfer, and which tax is assessed, computed and fixed by this decree, and the said title of the said parties to said shares of stock is also quieted against any claim of the State of California to an inheritance or transfer tax upon the said transfer of the said shares of stock, except the tax assessed, fixed, determined, and adjudged by this decree to be due the State of California and a lien upon said shares of stock.



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1920.

No. 268 (and 269)

J. LEROY NICKEL and NELLIE MILLER NICKEL,

Plaintiffs in Error,

v.

GEORGE A. COLE, AS STATE CONTROLLER OF THE STATE OF NEVADA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

LEONARD B. FOWLER, *Attorney-General,*
ROBERT RICHARDS, *Deputy Attorney-General,*
W. C. PRENTISS,
Attorneys for Defendant in Error.

Add 4 to all page numbers.

INDEX OF SUBJECTS

	PAGE
Contemplation of Death	8
Constitutionality of Nevada Act	9
Deed May Serve Same Purpose as Will	7
Passing Into Possession and Enjoyment Is Taxable Even Though Instrument Was Executed Prior to Passage of Statute	7
Power of Revocation	6
Power to Transmit from Dead to the Living Is Taxed	9
Remainderman in Same Position as Legatee and Devisee	8
Retroactive or Retrospective Operation of Nevada Act Not Necessary to Sustain Tax	5
Tax Accrued at Death	4
Tax on Right to Receive Estate	9
Transfers Took Effect at Death	2
Trust Deed and Will Constituted Single Transaction	6

add 4 to all page numbers.

LIST OF AUTHORITIES CITED

	PAGE
Appeal of Bickert, 140 Pac. 320, 1 Atl. 340	3
Attorney-General v. Middleton, 3 Hurl. & N. 125	9
Attorney-General v. Stone, 200 Mass. 186, 95 N. E. 395	9
Barley's Estate, In Re, 114 N. Y. Supp. 725	2
Blakemore & Bancroft, Inheritance Taxes, sec. 114	8
Bostwick's Estate, In Re, 160 N. Y. 489, 55 N. E. 208	2, 4
Brandreth's Estate, In Re, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148	3, 4
Carpenter v. Pennsylvania, 17 How. 456	9
Chambers v. Kelsey, 205 U. S. 466, 51 L. Ed. 882	9
Clarke v. Treasurer and Receiver-General, 226 Mass. 301	7
Commonwealth v. Smith, 5 Pa. St. 143	9
Conwell's Estate, 6 Pa. Co. Ct. 368	6
Crocker v. Shaw, 174 Mass. 296, 54 N. E. 549	3, 7
Judson, In Re, 132 N. Y. 472	6
Douglas County, In Re, 84 Neb. 586, 121 N. W. 593	3, 4
Estate of Reynolds, 160 Cal. 600, 117 Pac. 768	8
Gleason & Otis, Inheritance Taxation, 2d ed. p. 115	8
Green's Estate, In Re, 153 N. Y. 223, 47 N. E. 292	2, 4
Hart's Estate, In Re, 162 N. Y. Supp. 716, 98 Misc. Rep. 515	5
Hetz v. Woodman, 218 U. S. 205, 54 L. Ed. 1001	9
Jones, In Re, 120 N. Y. Supp. 862	6
Keeney v. New York, 222 U. S. 525	8
Knowlton v. Moore, 178 U. S. 56	9
Lane's Estate, in Re, 155 Pa. St. 378, 26 Atl. 728	7
Magoun v. Bank, 170 U. S. 283	9
Mario Estate, In Re, 14 Pa. Co. Ct. R. 171, 3 Pa. Dist. R. 38	3
Masury's Estate, In Re, 28 App. Div. 580, 51 N. Y. Supp. 331	2, 3
Matter of Garcia, 183 App. Div. Sup. Ct. of N. Y. 712	5
Matter of Mahlstedt, 67 App. Div. N. Y. 176, 73 N. Y. Supp. 818	8
Mansfield's Estate v. People, 212 Ill. 400, 72 N. E. 446, 447	8
Minot v. Stevens (Mass.) 93 N. E. 973	9
Moir's Estate, In Re (Ill.) 89 N. E. 905	5
New England Trust Co. v. Abbott (Mass.) 91 N. E. 379	3, 7
Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121	9
Ogsbury's Estate, In Re, 39 N. Y. Supp. 978	2, 5
Patterson's Estate, In Re, 127 N. Y. Supp. 284	2
People v. Kelly, 218 Ill. 509, 75 N. E. 1038	8
People v. Moir, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205	6
Plunder v. Coler, 178 U. S. 115, 44 L. Ed. 998	9
Reich v. Commonwealth, 106 Pa. St. 521, 527	5, 6
Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121	8
Seaman's Estate, In Re, 147 N. Y. 69, 41 N. E. 401	2, 3, 5
Sharer, In Re, 73 N. Y. Supp. 1057	6
Short's Estate, In Re, 16 Pa. St. 66	9
State v. Bullen, 143 Wis. 542, affirmed in Bullen v. Wisconsin, 240 U. S. 625	3, 5
State ex rel. Gelsthrope v. Turnell, 20 Mont. 249, 51 Pac. 267, 39 L. R. A. 170	9

Stewart v Doyle — p. 14

PAGE

State v. Mollier, 96 Kan. 544, 152 Pac. 771, 1916 L. R. A. 551 9
State Street Trust Company v. Stevens (Mass.) 95 N. E. 851 6
Stevens v. Bradford, 185 Mass. 439, 70 N. E. 425 9
Succession of Levy, 115 La. 378, 39 South. 37, affirmed in Cohen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310 9
Vanderbilt v. Eidman, 196 U. S. 480 7
Wellborn v. Weaver, 63 Am. Dec. 242 7
Westhus v. Union L. Co., 161 Fed. 705 9
Wright v. Blakeslee, 101 U. S. 174, 25 L. Ed. 1084 9

IN THE

Supreme Court of the United States

J. LEROY NICKEL AND NELLIE MILLER NICKEL,

v. *Plaintiffs in Error.*

GEORGE A. COLE, AS STATE CONTROLLER OF THE STATE OF NEVADA,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

The main facts in this case are as follows: The inheritance-tax law of Nevada was approved March 26, 1913, but by the terms of section 31 thereof it did not take effect until thirty days thereafter or April 25, 1913. That on April 17, 1913, after the approval of the inheritance-tax statute of Nevada, but before it became fully operative, Henry Miller, the owner of a large number of shares of stock in a Nevada corporation, made and executed a deed of trust and also his last will and testament. At the time of the execution of said deed of trust and said will and testament, Mr. Miller was eighty-six years of age, and was an invalid. He was then confined to his home by illness from which he never recovered, and on October 14, 1916, he died.

By the deed of trust, which was delivered on the date of its execution, Henry Miller transferred to Nellie Miller Nickel, his daughter, and only surviving child, and to J. Leroy Nickel, her husband, all of the aforementioned stock upon certain trusts. On the same day, the stock was indorsed and delivered to the trustees, and was transferred to the books of the corporation, and the trustees accepted the trust. The deed of trust and the stock were thereafter kept in a safe-deposit box in the exclusive custody of the trustees, until after the death of the grantor. The stock was, by deed of trust, transferred to the trustees to be disposed of by them after the death of Henry Miller. (Deed of Trust, Transcript, page 7).

The will, which was executed on the same day as the deed of trust, contains substantially the same provisions as such deed and directs the trustees of the trust estate to pay the beneficiaries the amounts therein specified, which are the same as named in the deed.

The particular portions of the statutes under which the tax is imposed are found under sections 1 and 30 of the inheritance-tax law (Stats. 1913, 411, 422) and read as follows:

> A tax shall be and is hereby imposed upon the transfer of any and all property within the jurisdiction of this state, and any interest therein or income therefrom, whether belonging to the inhabitants of this state or not, and whether tangible or intangible, not hereinafter exempted, which shall pass in trust or otherwise by will or by the statutes of inheritance of this or any other state by deed, grant, sale or gift made without valuable and adequate consideration in contemplation of the death of the grantor, vendor, assignor or donor or intended to take effect in possession or enjoyment at or after such death, as specified in this act.
>
> The word "transfer," as used in this act, shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein described. The word "decedent," as used in this act, shall include the testator, intestate, grantor, bargainer, vendor or donor.
>
> The words "contemplation of death," as used in this act, shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in nowise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*, and it is hereby declared to be the intent and purpose of this act to tax any and all transfers which are made in lieu of or to avoid the passing of the property transferred by testate or intestate laws.

TRANSFERS TOOK EFFECT AT DEATH

The transfers were intended to and did take possession only upon the death of Henry Miller, and the property did not vest in possession or enjoyment until after such death.

In Re Masury's Estate, 28 App. Div. 580, 51 N. Y. Supp. 331;
In Re Ogsbury's Estate, 39 N. Y. Supp. 978;
In Re Barley's Estate, 114 N. Y. Supp. 725;
In Re Patterson's Estate 127 N. Y. Supp. 284;
In Re Seaman's Estate 147 N. Y. 69, 41 N. E. 401;
In Re Green's Estate, 153 N. Y. 223, 47 N. E. 292;
In Re Bostwick's Estate, 160 N. Y. 489, 55 N. E. 208;

In Re Brandreth's Estate, 169 N. Y. 437, 62 N. E. 563; 58 L. R. A. 148;
In Re Douglas County, 84 Neb. 506, 121 N. W. 593;
Appeal of Biebert, 110 Pac. 329, 1 A. 346;
In Re Mario Estate, 14 Pa. Co. Ct. R. 171, 3 Pa. Dist. R. 38;
Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549;
New England Trust Co. v. Abbott (Mass.), 91 N. E. 379;
State v. Bullen, 143 Wis. 512.

In Re Masury's Estate, 28 App. Div. 580, 51 N. Y. Supp. 331, the owner of property transferred it to a trustee, in trust during the grantor's life, to pay the net avails to himself or to his order, and "from and after my death to pay to my grandson the said net avails during his lifetime," which transfer was made previous to the inheritance-tax law. The court held that the rights of the grantee under the deed did not accrue until the death of the grantor, which occurred after the enactment of the statute. It was there said:

> We are equally clear in the conclusion that the trust deed bearing date of March 10, 1890, * * * did not vest the beneficiary with any rights of property until the death of the grantor, and that it comes within the provisions of the statute, and is subject to the tax ordered to be collected by the order of the surrogate.

In Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549, the trust deed provided that the grantor was to receive the net income during her life and after her death the principal to be conveyed to such persons as she should appoint by her last will. The trust deeds were executed before the statute took effect, but the court said:

> It is immaterial, it seems to us, in this case, as it would be in the case of a will, that the indentures were dated and executed before St. 1891, c. 425, took effect. It is the vesting of the property in possession and enjoyment on the death of the grantor, and after the statute took effect, that renders it liable to the tax, and both of those things happened in this case. In Re Green's Estate, supra; In Re Seaman's Estate, supra. The appellant has pointed out some difficulties that might arise in a supposable case, but it is enough to say that they do not exist in this case. No interest vested in this case, either possession or enjoyment, in any of the legatees, till after the death of the grantor.

In Re Seaman's Estate, 147 N. Y. 69, 41 N. E. 401, the testator devised an undivided half of his estate in trust for his daughter during

her life and devised the remainder to his son's children living at her death. The court said:

> A right of succession passed to the four living children of George at the death of testator. It came from him; it was transferred by him; taking effect at his death; and passed then or never.

In Re Green's Estate, 153 N. Y. 223, 47 N. E. 292, the deed of trust was executed and delivered before, but the grantor did not die until after, the passage of the inheritance-tax statute, yet the court said:

> We think it quite clear that the remainders were transferred to the niece, in possession or enjoyment, by an instrument intended to take effect for that purpose, at or after the death of the donor, and so the case is brought within the terms of the statute. It matters not whether the transfer is by grant or by gift; so long as it was intended to take effect, in possession or enjoyment, at or after the death of the grantor or donor, the devolution of title is subject to the tax. The death of the donor was the event which made the transfer complete and effective, and secured to the niece the possession and enjoyment of the property. In Re Seaman's Estate, 147 N. Y. 77, 41 N. E. 401.

In Re Ogsbury's Estate, 39 N. Y. Supp. 978, the trust deed was executed and delivered in 1885, by which the grantor conveyed personal property, consisting of stocks and bonds upon trust to receive the income and apply the same to the use of deceased during his life, and upon his death to convey the property to such persons as deceased might appoint and direct in his will. The tax statute was passed in 1887, and the deceased died in 1889, but the court said:

> While the technical legal title may be said to have passed under the indenture to the trust company, still the property and all interest therein remained in the deceased, as much as though the indenture had not been made or delivered.

TAX ACCRUED AT DEATH

To defeat taxation under the inheritance-tax system a transfer must be made absolute during the lifetime of the owner. If it is not absolute, and he reserves any interest in the property, then the property becomes liable for the tax at the time of his death.

In Re Brandreth's Estate, 169 N. Y. 437, 62 N. E. 563;
In Re Bostwick's Estate, 160 N. Y. 489, 55 N. E. 208;
In Re Douglas County, 84 Neb. 506, 121 N. W. 593;

State v. Bullen, 143 Wis. 512, affirmed in Bullen v. Wisconsin, 240 U. S. 625;
In Re Moir's Estate (Ill.), 69 N. E. 985;
Reich v. Commonwealth, 106 Pa. St. 521, 527;
In Re Ogsbury's Estate, 39 N. Y. Supp. 978;
In Re Hart's Estate, 162 N. Y. Supp. 716, 98 Misc. Rep. 515.

Tax accrued when Miller died. We desire to quote from the case of Matter of Garvin, 183 App. Div. Sup. Ct. of New York, 712. We quote from page 716 as follows:

> The test by which the point of law under consideration is to be decided is not a theoretical consideration of the nature of the property right or interest the wife acquired in the corpus upon the creation of the trust, but whether the transfer of the corpus took effect at that time within the contemplation of the statutory provisions relating to the imposition of transfer taxes by which the transfer tax accrues and may be computed and collected forthwith, or whether the transfer, being contingent with respect to possession and enjoyment on the donee surviving the donor, was testamentary in character, in which case the transfer tax would not accrue until the donor died. (Matter of Green, 153 N. Y. 223; Matter of Hodges, supra; Matter of Dana Co., 215 N. Y. 461; Matter of Hoffman, 143 Id. 327; Matter of Van Cott, supra; Matter of Thompson, supra.) It seems to me quite clear that, within the purview of the transfer-tax legislation, the transfer did not become effective and the transfer tax did not accrue until the death of the donor.

RETROACTIVE OR RETROSPECTIVE OPERATION OF NEVADA ACT NOT NECESSARY TO SUSTAIN TAX

The Nevada Act does not have to be considered to be retroactive or retrospective in its operation in order to make it apply to this case. We desire to quote from In Re Seaman, 147 N. Y. 69, 41 N. E. 401, cited and approved in Re Masury's Estate, 28 App. Div. 580, 51 N. Y. Supp. 331, wherein is found the following language:

> A grantor may have conveyed and delivered his deed before 1892, in contemplation of death, and to take effect upon the happening of that event, or reserving a power of revocation, as well as the possession of enjoyment, during his lifetime; and the legislature certainly intended to put such a transfer on the same footing as one by will. It is of no consequence

that the will was executed before the statute if the death occurs after, and the same rule was intended to be explicitly applied to grants *causa mortis*. Though the deed precedes the tax law, as the execution of the will precedes that law in a possible case, yet the transfer in both instances is to date from the one event which makes it operative and effective. So much the legislature certainly intended, and so much can be admitted without making the statute operate retrospectively.

True, in New York and Illinois there is an express provision, by which the statute is applicable whether the transfer was made before or after the passage of the Act, but it is evident, as stated in Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549, that the conclusion arrived at in the cases from those States would have been the same without that provision.

TRUST DEED AND WILL CONSTITUTED SINGLE TRANSACTION

The fact that the trust deed and the will were executed on the same day makes them a single transaction entered into for the purpose of evading the inheritance tax, and brings the transfer squarely within the law as taking effect after the death of the grantor.

In Re Dobson, 132 N. Y. 472;
People v. Moir, 207 Ill. 180, 69 N. E. 905, 99 Am. St. Rep. 205;
Reich v. Commonwealth, 106 Pa. 521;
Cowell's Estate, 6 Pa. Co. Ct. 368.

The deed was not recorded until after the death of the grantor. This fact also makes the statute applicable.

In Re Jones, 120 N. Y. Supp. 862;
In Re Slater, 73 N. Y. Supp. 1057.

POWER OF REVOCATION

Plaintiffs in error lay stress upon the fact that Henry Miller, the grantor, did not directly, in the trust deed, reserve the power of revocation. The test, however, by which the exemption is to be ascertained does not depend upon whether the power has or has not been inserted, but upon the passing of the property with all the attributes of ownership independently of the death of the transferor.

State Street Trust Co. v. Stevens (Mass.), 95 N. E. 851.

DEED MAY SERVE SAME PURPOSE AS WILL

There is no difference in principle between property passing by deed intended to take effect in possession and enjoyment on the death of the grantor and property passing by will.

Vanderbilt v. Eidman, 196 U. S. 480;
Crocker v. Shaw, 174 Mass. 245, 54 N. E. 549;
N. E. Trust Co. v. Abbott, 205 Mass. 279, 91 N. E. 379;
In Re Line's Estate, 155 Pa. St. 378, 26 Atl. 728;
Wellborn v. Weaver, 63 Am. Dec. 242.

In Crocker v. Shaw, 174 Mass. 266, the court says that it can see no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. We quote the exact language on page 267:

> We see no difference in principle between property passing by a deed intended to take effect in possession or enjoyment on the death of the grantor and property passing by will. In either case it is the privilege of disposing of property after the death of the grantor or testator and of succeeding to it which is taxed, though the amount of the tax is determined by the value of the property. The constitutionality of the law in regard to taxing property passing by will was fully considered in Minot v. Winthrop, 162 Mass. 113, and that case, we think, is decisive of this.

PASSING INTO POSSESSION AND ENJOYMENT IS TAXABLE EVEN THOUGH INSTRUMENT WAS EXECUTED PRIOR TO PASSAGE OF STATUTE

In support of the above contention, we desire to quote from the case of Clarke v. Treasurer and Receiver-General, 226 Mass. 301. We quote from page 305:

> It has been held that the passing into possession and enjoyment of such property is subject to such taxation even though the instrument under which the property passes was executed and effective before the statute imposing the excise was enacted. Crocker v. Shaw, 174 Mass. 266; Minot v. Treasurer and Receiver-General, 207 Mass. 588; Burnham v. Treasurer and Receiver-General, 212 Mass. 165. See also State Street Trust Co. v. Treasurer and Receiver-General, 209 Mass. 373.

REMAINDERMAN IN SAME POSITION AS LEGATEE AND DEVISEE

In support of this principle, we desire to quote Justice Lamar, in the case of Keeney v. New York, 222 U. S. 525. We quote from page 533:

> There is no natural right to create artificial and technical estates with limitations over, nor has the remainderman any more right to succeed to the possession of property under such deeds than legatees and devisees under a will. The privilege of acquiring property by such an instrument is as much dependent upon the law as that of acquiring property by inheritance, and transfers by deed, to take effect at death, have frequently been classed with death duties, legacy and inheritance taxes. Some statutes go further than that of New York, and tax gratuitous acquisitions under marriage settlements, trust conveyances, or other instruments where the transfer of property takes effect upon the death, not merely of the grantor, but of any person whomsoever.

CONTEMPLATION OF DEATH

The court will observe that by section 30 of our statute the words "contemplation of death" are defined. This definition differs materially from the constructions which had theretofore been given by the courts to these words. Our Legislature went even further in this particular section and provided as follows:

> It is hereby declared to be the intention and purpose of this act to tax any and all transfers which are made in lieu of or to avoid transfer by testate or intestate laws.

The Nevada trial court found that the trust deed made by Henry Miller was made in contemplation of death. Whether a deed is made in contemplation of death, is a question of fact on which the finding of the trial court is final.

> Blakemore & Bancroft, Inheritance Taxes, sec. 114;
> Gleason & Otis, Inheritance Taxation, 2d ed. p. 115;
> Rosenthal v. People, 211 Ill. 306, 71 N. E. 1121;
> Memfield's Estate v. People, 212 Ill. 400, 72 N. E. 446, 447;
> Estate of Reynolds, 169 Cal. 600, 147 Pac. 268.

It is a question of fact and must depend upon the circumstances of each particular case.

> People v. Kelly, 218 Ill. 509, 75 N. E. 1038;
> Matter of Mahlstedt, 67 App. Div. N. Y. 176, 73 N. Y. Supp. 818.

TAX ON RIGHT TO RECEIVE ESTATE

Estates do not vest in the sense of being exempt from an inheritance tax until the time for the vesting occurs. The tax, being based upon the right to receive, may be imposed, and by the Nevada statute is imposed, on all transfers which were not fully completed in possession and enjoyment at the time the Act went into effect.

Chambers v. Kelsey, 205 U. S. 466, 51 L. Ed. 882;
Magoun v. Bank, 170 U. S. 283;
Plumber v. Coler, 178 U. S. 115, 44 L. Ed. 998;
Nunnemacher v. State, 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N. S.) 121;
Westhus v. Union I. Co., 164 Fed. 795;
Hertz v. Woodman, 218 U. S. 205, 54 L. Ed. 1001;
New England Trust Co. v. Abbott (Mass.), 91 N. E. 379, 380;
Minot v. Stevens (Mass.), 93 N. E. 973.

CONSTITUTIONALITY OF NEVADA ACT

The following cases sustain the theory of the constitutionality of the Nevada Inheritance-Tax Act, as applied to the Miller estate:

State ex rel. Gelsthrope v. Turnell, 20 Mont. 219, 51 Pac. 267, 39 L. R. A. 170;
Wright v. Blakselee, 101 U. S. 174, 25 L. Ed. 1084;
Stevens v. Brodford, 185 Mass. 439, 70 N. E. 425;
Attorney-General v. Stone, 209 Mass. 186, 95 N. E. 395;
Carpenter v. Pennsylvania, 17 How. 436;
Attorney-General v. Middleton, 3 Hurl. & N. 125;
In Re Short's Estate, 16 Pa. St. 66;
Commonwealth v. Smith, 5 Pa. St. 143;
Succession of Levy, 115 La. 378, 39 South. 37, affirmed in Cohen v. Brewster, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310;
State v. Mollier, 96 Kan. 514, 152 Pac. 771, 1916c, L. R. A. 551.

POWER TO TRANSMIT FROM DEAD TO THE LIVING IS TAXED

In this connection we desire to quote Chief Justice White, in Knowlton v. Moore, 178 U. S. 56:

> • • • Tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the

dead to the living, on which such taxes are more immediately rested.

We submit that the findings and decree of the Nevada District Court are sound in law, and that there is no reason why the rulings of said Court and the Nevada Supreme Court should be overturned.

Respectfully submitted,

L. B. FOWLER, *Attorney-General,*
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W. C. PRENTISS,
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Shwab v Doyle 269 Fed 321
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

Nos. 268 and 269.

J. LEROY NICKEL AND NELLIE MILLER NICKEL, AS TRUSTEES, ETC., ET AL., PLAINTIFFS IN ERROR AND PETITIONERS,

vs.

GEORGE A. COLE, AS STATE CONTROLLER OF THE STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

NELLIE MILLER NICKEL AND J. LEROY NICKEL, AS TRUSTEES, ETC., PLAINTIFFS IN ERROR AND PETITIONERS,

vs.

STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND PETITIONERS.

EDWARD F. TREADWELL,
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Attorneys for Plaintiffs in Error and Petitioners.

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STATE OF NEVADA, DEFENDANT IN ERROR AND RESPONDENT.

REPLY BRIEF FOR PLAINTIFFS IN ERROR AND PETITIONERS.

I.

In our opening brief we reviewed most of the cases cited by defendants in error in their brief, they having also been

cited by them in the court below. We shall now briefly review the additional cases cited by them in their brief in this court.

1. The case cited by them as *"Appeal of Biebert,* 110 Pac., 329; 1 A., 346," is "Appeal of Seibert, 110 Pa. St., 320," reviewed on page 84 of our opening brief.

2. The case of *Matter of Garcia,* 183 App. Div., 712, is a decision by one of the departments, appellate division, of the Supreme Court of New York modifying an order of the surrogate. The case, however, was taken to the Supreme Court, which affirmed the decision of the surrogate without opinion, which of course was a disapproval of the decision of the appellate division. The order of the Supreme Court will be found in 182 N. Y. Suppl., 925. The opinion of the surrogate which is thus affirmed by the Supreme Court is a strong exposition of the law as we understand it and is found reported in 101 Misc., 387, and is based on a previous decision, also in accordance with our views, entitled *Matter of Meserole,* 98 Misc., 105. Counsel for defendants in error no doubt overlooked the fact that the decision cited by them had thus been disapproved.

3. *State St. Trust Co. vs. Stevens,* 95 N. E., 851, is found reported in 209 Mass., 373, where the facts are stated. The decision in the Northeastern Reporter does not contain the facts. It appears from the facts that the transfer was made in 1910 and *after* the act of 1907 imposing the tax. The only question was whether the gift was within the statute in view of the fact that the beneficiaries received the income during the life of the grantor, but the court held that since

they did not receive the possession or enjoyment of the *corpus* of the property until after death the transfer was within the statute.

4. *Clarke vs. Treasurer and Receiver-General,* 226 Mass., 301, involved a contract to receive money by will, and the court held that such a contract implies that the bequest is to be received subject to the general laws respecting such bequests that shall be in force at the death of the testator. The court also pointed out that there was a statute imposing a tax substantially the same at the time of the contract. The case is therefore similar to *State vs. Mollier* (Kans.), 152 Pac., 771, reviewed on page 87 of our opening brief. This was all that was decided in the case, and the language used by the court must be limited to "*such* property." This is shown by reference to the cases cited by the court, viz., (*a*) *Crocker vs. Shaw,* which is reviewed on page 144 of our opening brief, where we showed that the grantor reserved a power of appointment; (*b*) *Minot vs. Treasurer and Receiver-General,* where the property was to go in accordance with a testamentary power of appointment; (*c*) *Burham vs. Treasurer and Receiver-General,* where a testamentary power of appointment was reserved, and (*d*) *State St. Trust Co. vs. Treasurer and Receiver-General,* in which the trust was created in 1910 and after the act of 1907 under which the tax was imposed.

5. The case of *Magoun vs. Illinois Trust Savings Bank,* 170 U. S., 283, is cited on the point that the tax is on the *right* to receive the estate. Whether it is on the right to receive or the right to grant the estate is immaterial, be-

cause the *right* to grant was exercised when the grant was made and the *right* to receive was created at that time. The case of *Plummer vs. Coler*, 178 U. S., 115, is cited to the same effect. As a matter of fact, what the court said in that case was "It is a tax upon the right of transfer."

Hertz vs. Woodman, 218 U. S., 205, is also cited to the proposition that the tax is upon the right to receive the property. What the court said in that case was that the tax was "upon the transmission, or the *right* to succeed to a legacy" (p. 219). That case and other cases cited therein involved the question as to when the tax accrued under the Federal statutes. That act was construed not to impose a tax until the right of succession becomes an absolute right of immediate possession or enjoyment, and it was held under that act that legacies upon conditions which might never happen were not subject to the tax until they became absolute. It must be obvious that this is not true under the State statute, which expressly imposes the tax upon estates "determinable upon any future or contingent event," and upon estates in "remainder, reversion, or other expectancy," and makes the tax payable irrespective of the vesting of the estate in possession or enjoyment (sec. 5). Such a tax also becomes a lien on the property irrespective of the contingent character of the estate, and irrespective of when it vests in possession and enjoyment (sec. 5). The act also expressly covers transfers of interests giving merely a "future" right of possession and enjoyment (sec. 30).

6. *Gelsthorpe vs. Furnell*, 20 Mont., 299, involved a tax upon a pending estate in probate, and the court upheld such a tax on the same theory as was adopted in *Carpenter vs.*

Commonwealth and other cases reviewed on pages 71-74 of our opening brief. The court considered quite at length whether the tax was on the right to transfer property or on the right to receive it, and quoted the language of Mr. Justice Brown in *United States vs. Perkins*, 163 U. S., 625, that it is "upon the right to dispose of it." Judge Hunt in the case under review favored the view that it was on the right to receive the property. However, this is not important, as he recognized that it is on the *right* to receive or on the *right* to convey, and so do counsel for defendants in error, and that *right* arose before the statute in the case at bar. In the case under review the right arose subject to the right of the State, as a regulation of the probate administration, to impose a tax to meet the cost of the administration.

II.

Counsel for defendants in error do not dispute that the State court held that the tax was imposed on the *right* to transfer or upon the *right* to receive the property transferred, nor do they claim that the tax was on the coming into possession of the property, or that such a tax could be imposed even with respect to an absolute transfer made before the act, and they could not well make such a claim in view of the clear decision of the State court to the contrary. However, they do quote the provision of section 30 of the act defining the word "transfer." The language of that section is in accordance with the decision of the State court in construing the act as taking the transfer and not the coming into possession, for it will be seen that that section provided that there shall be a taxable transfer whether possession and en-

joyment is present *or future* and section 7 of the act makes the tax *payable* on the death of the grantor, irrespective of whether possession and enjoyment then accrue. However, as this court follows the State court as to the construction of the statute, this matter need not be further considered. As to the construction of the State court, see our opening brief, pages 76-81.

III.

Counsel state in their statement of the facts that the stock was, by deed of trust, transferred to the trustees to be disposed of by them after the death of Henry Miller. As a matter of fact, the trustees were given an unlimited power of sale, which they could have exercised either before or after the death of Miller. (See Record, folios 148-9.)

IV.

On the proposition made in our opening brief, not disputed by defendants' brief, that this court is not bound by the decision of the State court on questions of general jurisprudence, including the construction of instruments, we wish to cite the following additional cases:

Fozcroft vs. Mallett, 45 U. S., 353.
Russell vs. Southard, 53 U. S., 139.
Carpenter vs. Providence Washinton Ins. Co., 41 U. S., 495.
Mich. Cent. R. Co. vs. Myrick, 107 U. S., 102.
Kuhn vs. Fairmont Coal Co., 215 U. S., 363.
Burgess vs. Seligman, 107 U. S., 20M.
Barber vs. Pittsburg, etc., R. Co., 166 U. S., 100.

In determining whether rights under a contract have been unconstitutionally infringed, this court may determine for itself whether the contract was valid in its inception, and is not concluded by the State decision.

Delmas vs. Merchants' Mut. Ins. Co., 81 U. S., 14.
Western Union Tel. Co. vs. Commercial, etc., Co., 218 U. S., 414.
Penn. R. R. vs. Hughes, 191 U. S., 486.
Northwestern University vs. People, 99 U. S., 321.
Mobile, etc., Ry. Co. vs. Tenn., 153 U. S., 495.

V.

While no question is raised in the brief of defendants in error as to the existence of a Federal question in the case, on the proposition made in our opening brief that in effect we have by the judgment been held for a tax with no act either as written or as construed applying to the actual transaction, we would cite the case of *Chicago Company vs. Chicago*, 166 U. S., 226, to the effect that the due process of law clause protects us from judicial, as well as legislative and executive, acts of the State.

That the taking of property without any law authorizing the taking is a taking without due process of law, we would cite *Scott vs. McNeal*, 154 U. S., 34.

VI.

Finally, to remove all question of any censurable action in making this conveyance at the time it was made, we would cite the following language in *Weeks vs. Sibley*, 269 Fed., 155:

"The right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation. The right to so do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones for the purpose of reducing or avoiding taxation.

"It is not unnatural that any thoughtful business man take such steps. It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation."

Respectfully submitted,

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OCTOBER TERM, 1920

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Defendant in Error.
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vs.
STATE OF NEVADA,
Defendant in Error.
No. 269

BRIEF OF AMICUS CURIAE.

GARRET W. MCENERNEY,
Amicus Curiae.

PRIVATE-BAKER PRINTING CO., SAN FRANCISCO.

Index.

Page

I. The Supreme Court of Nevada holds that while the transfer here reviewed was initiated eight days before the Nevada transfer law came into operation, nevertheless the transfer of title was incomplete until the death of the donor and was, therefore, a taxable transfer. The premise being conceded, the conclusion is inevitable, and in any event, there is no federal question involved in either premise or conclusion. This finally disposes of the case, unless it be held that the premise upon which the conclusion is based rests upon grounds which are wholly without substance and altogether wanting in color of merit 3

II. The Supreme Court of Nevada furthermore holds that under the Nevada statute, in the case of a transfer of future interests limited upon a reserved life estate in the grantor, there is no liability for a tax until the holder of the future interest comes into possession and enjoyment on the death of the grantor, and hence, that the liability for the tax in the present cases arose at the death of the grantor, which happened after the statute took effect 6

III. It is not certain whether the holding of the Supreme Court of Nevada dealt with in the immediately preceding point is referable to the views of that court dealt with in Point I, i. e., that the transfer of title was incomplete until death, or whether the court treated the act as laying a tax upon the coming into possession of future interests. It is likely that the decision rests upon the former rather than upon the latter ground, because a tax upon coming into possession is a direct tax upon property and not a transfer tax, and if the act were construed as imposing such a tax, it would violate the Constitution of Nevada providing (1) that "the legislature shall provide by law for a uniform and equal rate of assessment and taxation," and (2) that the subject of each law "shall be briefly expressed in the title"..... 11

IV. Moffitt v. Kelly, 218 U. S. 400 (1910), holds that the decision of the highest court of a state upholding the validity of a state tax is not reviewable in this court if there be nothing in the Constitution of the United States which denies to the state the abstract power to lay such a tax; and this decision is equally applicable, whether we regard the decision of the Supreme Court of Nevada as based upon the incomplete transfer idea, or upon the coming into possession idea..... 13

V. If we assume, however, that the cases at bar are not to be disposed of upon the considerations already stated, it will be in order briefly to enumerate the propositions of general jurisprudence upon which the Supreme Court of Nevada rested its conclusion that there had been an incomplete transfer of title at the time the statute took effect, and that the transfer was, therefore, taxable under that statute, with a view to discovering whether these propositions as applied to the facts of this case are so wholly unsubstantial or lacking in color of merit as to be laid aside in the consideration of the case..... 14

Page

(a) The transfer of April 17, 1913, did not take effect as a transfer of the equitable interests in remainder until the death of the grantor, October 14, 1916..... 14

(b) The date of the grantor's death is to be deemed the effective date of transfer of title upon the ground that the grantor reserved the income for life, and a power of revocation, and could by testamentary disposition have defeated the rights of the beneficiaries..... 15

(c) The transfer is liable to the tax upon the ground that it was made with intent to evade transfer taxation..... 16

(d) Although the Nevada act provided that it was not to take effect until thirty days from the date of its passage, the legislature intended that no tax-free transfers should be made after the passage of the act..... 18

VI. Even though the nonfederal grounds of the Nevada decision were disregarded, and Moffitt v. Kelly were held not to apply, it would still be necessary to show that there was a federal question in the case; and we now consider the theories upon which it may be argued that a federal question exists..... 18

VII. Summary and Conclusion..... 21

Table of Cases.

	Pages
Bear Lake Co. v. Garland, 164 U. S. 11	9
Bi-Metallic Co. v. Colorado, 239 U. S. 441	6
Bullen v. Wisconsin, 240 U. S. 625	8, 16, 17
Bullock v. State, 41 Sup. Ct. 193	20
Carter v. Bugbee, 92 N. J. L. 390; 106 Atl. 413	4, 15
Chicago Company v. Chicago, 166 U. S. 226	20
Craig, Matter of, 97 App. Div. 289, 89 N. Y. Supp. 971	7, 8
Crocker v. Shaw, 174 Mass. 266	7, 10
Dana, Matter of, 215 N. Y. 461, 109 N. E. 557	16
East Central Eureka Mining Co. v. Central Co., 204 U. S. 266	15
Enterprise Dist. v. Farmers Co., 243 U. S. 157	5
Ft. Smith Co. v. State, 251 U. S. 532	13
Gannon v. Johnston, 243 U. S. 108	5
Green, Matter of, 153 N. Y. 223, 47 N. E. 292	8
Hunt v. Wicht, 174 Cal. 205	6
Keeney v. New York, 222 U. S. 525	3
Kryger v. Wilson, 242 U. S. 171	5
Lansing, Matter of, 182 N. Y. 238	8
Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283	3, 13
Minneapolis Co. v. Washburn Co., 41 Sup. Ct. 140	6
Moffitt v. Kelly, 218 U. S. 400	13
Nickel v. State, 43 Nev. 12	10
Pell, Matter of, 171 N. Y. 48	7, 8, 12
Price v. Illinois, 238 U. S. 446	6
Scott v. McNeal, 154 U. S. 34	19
Seaman, Matter of, 147 N. Y. 69, 41 N. E. 401	4, 8, 9
State Street Trust Company v. Stevens, 209 Mass. 373	10
State v. Probate Court, 102 Minn. 268, 113 N. W. 888	17
Ward v. Love Co., 253 U. S. 17	6
Weeks v. Sibley, 209 Fed. 155	17

Supreme Court of the United States

OCTOBER TERM, 1920

J. LEROY NICKEL and NELLIE MILLER NICKEL, as Trustees etc. et al., *Plaintiffs in Error,* vs. GEORGE A. COLE, as State Controller of the State of Nevada, *Defendant in Error.*	No. 268
NELLIE MILLER NICKEL and J. LEROY NICKEL, as Trustees etc., *Plaintiffs in Error,* vs. STATE OF NEVADA, *Defendant in Error.*	No. 269

BRIEF OF AMICUS CURIAE.

Our interest in two cases already docketed but which will probably not be reached until the next term of court, has prompted us to ask permission to file this brief. Both cases involve the question whether the

Federal Estate Tax Act of September 8, 1916 is to be construed as applying either to past transfers as such or to future interests created by past transfers, and whether it is constitutional if so construed. The first case involves an irrevocable transfer (made in 1915), in which the donor reserved no interest whatever, but passed on both title and possession at the moment of the delivery of the instrument of transfer; and the second case involves an irrevocable transfer (made in 1901) whereby the donor reserved a life interest but created remainders which vested in her children and grandchildren at the time of the transfer. In each instance the donor died after the passage of the Act of September 8, 1916. The two cases involve (a) rules of general jurisprudence; (b) the construction of the Federal Act, and (c) the taxing powers of Congress under the federal constitution.

The two cases at bar from Nevada involve (a) rules of general jurisprudence; (b) the construction of the State act, and (c) the limitations imposed by the federal constitution upon state taxation.

With this explanation of the occasion for our intervention, we proceed briefly to point out the questions which are here for decision.

I.

The Supreme Court of Nevada holds that while the transfer here reviewed was initiated eight days before the Nevada transfer law came into operation, nevertheless the transfer of title was incomplete until the death of the donor and was, therefore, a taxable transfer. The premise being conceded, the conclusion is inevitable, and in any event, there is no federal question involved in either premise or conclusion. This finally disposes of the case, unless it be held that the premise upon which the conclusion is based rests upon grounds which are wholly without substance and altogether wanting in color of merit.

The validity of the Nevada transfer tax law (Stats. Nevada 1913, pp. 411, 422), as we have said, has not been assailed below or here. It could not well be, for it is modeled on the 1911 transfer tax law of California (Stats. California, 1911, p. 713), which in turn was based upon earlier California transfer tax laws, dating from 1893, and taken from the New York statutes of 1885, 1887 and 1891, whose validity in revised form has been upheld by this court. (*Keeney v. New York*, 222 U. S., 525). A similar statute in Illinois has also been upheld by this court. (*Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283.)

Furthermore, it is not questioned that the transfer here involved is one which would have been taxable under the terms of the Nevada act, had it been made after the effective date of the act. The Nevada act was approved March 26, 1913, and went into effect April 25, 1913. The transfer was made April 17, 1913.

The Supreme Court of Nevada has interpreted its own statute as one imposing a transfer tax, thus satisfying the requirement of the Constitution of Nevada that

the subject-matter of an act shall be expressed in the title. Also, the Supreme Court of Nevada has declared that the statute does not apply to past transfers (43 Nev. 27, foot), and has furthermore decided that if the transfer here involved had been complete before the act was passed, it would not have been subject to the tax. The case, therefore, rests upon the proposition that the transfer was incomplete when the law came into operation, and if this conclusion is sound there is no doubt that the transfer was taxable.

Carter v. Bugbee, 92 N. J. L., 390; 106 Atl., 413 (1919), is in point.

The decision is stated in the syllabi in the official report and the reporter system, which we quote in the order named:

> "A tax upon the transfer of property that has been made the subject of an irrevocable deed of gift intended to take effect in possession, so far as the beneficiary is concerned, at the death of the settlor is valid although imposed under authority of a statute not in existence at the time of the execution of the deed of gift, *when the right, title and interest of the beneficiary in the subject-matter of the gift does not vest in him or her until the death of the settlor, and the enactment of the statute antedates that event.*"
>
> —
>
> "A transfer tax can be legitimately imposed by the Legislature upon property which has already been made the subject of a deed of trust, *when such deed does not operate to transfer the title to such property until after the tax act comes into being,* . . .".

Matter of Seaman, 147 N. Y. 69, 41 N. E. 401 (1895), expresses similar views *arguendo* in the following ex-

tract from the opinion into which we have introduced bracketed matter showing the full effect of the extract when read in connection with the rest of the opinion.

> "A grantor may have conveyed and delivered his deed before 1892, in contemplation of death and to take effect [as a transfer of title] upon the happening of that event, or reserving a power of revocation, as well as the possession or enjoyment, during his lifetime; and the Legislature certainly intended to put such a transfer on the same footing as one by will. It is of no consequence that the will was executed before the statute if the death occurs after, and the same rule was intended to be explicitly applied to grants causa mortis [because we hold such a gift to be inchoate and ambulatory until the death of the grantor]. Though the deed [above mentioned, which is to take effect as a transfer of title only when the grantor dies] precedes the tax law, as the execution of the will precedes that law in a possible case, yet the transfer in both instances is to date from the one event which makes it operative and effective [as a transfer of title, namely, the death of the donor or testator as the case may be]." (147 N. Y. 77; 41 N. E. 403.)

We do not here stop to consider the correctness or incorrectness of the premise upon which the Supreme Court of Nevada based its conclusion that the transfer of title was incomplete until the death of the donor. It may be immediately stated, however, that whether this premise be correct or not, if it is not wholly unsubstantial or entirely lacking in color of merit, the case is foreclosed of further discussion because disposed of upon a non-federal ground.

Enterprise Dis. v. Farmers Co., 243 U. S. 157;
Gannon v. Johnston, 243 U. S. 108, 113-114;
Kryger v. Wilson, 242 U. S. 171, 176;

Bi-Metallic Co. v. Colorado, 239 U. S. 441, 444;
Price v. Illinois, 238 U. S. 446, 451.

See, also,

Ward v. Love Co., 253 U. S. 17;
Minneapolis Co. v. Washburn Co., 41 Sup. Ct. 140.

II.

The Supreme Court of Nevada furthermore holds that under the Nevada statute, in the case of a transfer of future interests limited upon a reserved life estate in the grantor, there is no liability for a tax until the holder of the future interest comes into possession and enjoyment on the death of the grantor, and hence, that the liability for the tax in the present cases arose at the death of the grantor, which happened after the statute took effect.

The well-nigh universal rule in this country is that the transfer of title is the thing taxed, and that the liability for the tax arises at the moment of the transfer of title.

> "*It is the vesting in interest that constitutes the succession*, and the question of liability to such a tax must be determined by the law in force at that time."
>
> *Hunt v. Wicht*, 174 Cal. 205, 209.

> "In the Matter of Pell, 171 N. Y. 48, 55, . . . it is said that such a transfer tax being one not imposed on property but upon the right to succession, it 'follows that *where there was a complete vesting of a residuary estate before the enactment of the transfer tax statute, it cannot be reached by that form of taxation*'."
>
> *Hunt v. Wicht*, *supra*, pp. 209-210.

"The underlying principle which supports the tax is that such right (the right of succession) is not a natural one but is in fact a privilege only, and that the authority conferring the privilege may impose conditions upon its exercise. But *when the privilege has ripened into a right it is too late to impose conditions of the character in question*, and when the right is conferred by a lawfully executed grant or contract it is property and not a privilege, and as such is protected from legislative encroachment by constitutional guaranties."

Matter of Craig (1904), 97 App. Div. 289; 89 N. Y. Supp. 971, 975; affirmed without opinion in 181 N. Y. 551; 74 N. E. 1116.

The ruling that the liability for the tax arises at the moment of transfer (as stated in the foregoing quotations and adopted in practically all of the states) may have been influenced in some of the states by the fact that their transfer tax statutes provide that there shall be a lien upon the property transferred from the moment of the transfer. The Nevada statute, however, contains no such provision. Likewise in Massachusetts the provision is absent. This circumstance is worthy to be noted, for it may explain in whole or in part the conclusion which the Supreme Court of Nevada reached in the construction of its own statute, and it may have influenced the Massachusetts court in making the statements which are quoted by the Supreme Court of Nevada with approval.

In *Crocker v. Shaw*, 174 Mass. 266, 268 top (1899), which is cited by the Nevada court, it was stated in the case of a transfer of future interests dependent upon a reserved life estate in the donor, that the

event which gave rise to the tax was the coming into possession or enjoyment by the beneficiaries upon the death of the grantor. It is to be noted, however, that in this case the transfer was clearly taxable as one in which title did not pass until death. The donor made a transfer in trust, reserving the life income to herself with remainder to those whom she should by will appoint, and thus retained such absolute dominion over the property to the time of her death that it could not be said that there had been any transfer of title at all. (*Bullen v. Wisconsin*, 240 U. S. 625, 630.)

It is also to be noted that *Crocker v. Shaw* was the first of the Massachusetts cases in which the question was considered as to when the liability for the tax arose, and that in giving expression to the views above mentioned, the court believed it was following two New York cases, *Matter of Green*, 153 N. Y. 223, 47 N. E. 292 (1897), and *Matter of Seaman*, 147 N. Y. 69, 41 N. E. 401 (1895). The New York cases, however, take a view of the New York statute which is directly opposed to the views expressed by the Massachusetts court in dealing with its own statute. (*Matter of Pell, supra; Matter of Craig, supra; Matter of Lansing*, 182 N. Y. 238.)

In the Green case the New York law of 1885 and acts amendatory thereof were in force when the transfers occurred in 1889-1891, but in the opinion reference is made only to the New York act of 1892, which was a revision of the earlier acts. The date given in the opinion is misleading and presents the suggestion that the transfers occurred before the

enactment of the transfer law, but this, of course, is not the fact (*Bear Lake Co. v. Garland,* 164 U. S. 11), and the case was not dealt with upon that basis. The question for decision was, whether the transfers fell within the classification of taxable transfers "intended to take effect in possession or enjoyment at or after the death of the grantor," and in determining that the transfers were of that character the New York court used language to the point there under consideration which the Massachusetts court mistakenly regarded as supporting an altogether different idea.

Matter of Seaman, also misread by the Massachusetts court, involved a case where the remainders were created in 1876, but the remaindermen did not come into possession or enjoyment until 1893. In the interval, an act was passed in 1892 which it was claimed laid a tax upon the coming into possession of future interests already created. The court held, however, as matter of construction, that the statute did not tax the coming into possession of vested remainders created before the passage of the act, and in so doing used the language which we have quoted on page 5, *supra.*

The Nevada court adopted the error of the Massachusetts court, as may be seen from the extracts below:

> "It is immaterial, it seems to us, in this case, as it would be in the case of a will, that the indentures were dated and executed before St. 1891, c. 425, took effect. It is the vesting of the property in possession and enjoyment on the death of the grantor and after the statute took effect, that renders it liable to the tax, and both of those things

happened in this case. In re Green and In re Seaman, ubi supra."

Crocker v. Shaw, 174 Mass. 266, 268 top., 54 N. E. 549, 550, column 2, middle (1899).

"It is immaterial, in this case, that the deed was dated and executed before the inheritance-tax law of Nevada became effective. It is the vesting of the property in possession and the enjoyment of the same upon the death of the grantor, and after the statute took effect, that renders it liable to the tax; and both those things happened in this case. Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549; In re Green's Estate, 153 N. Y. 223, 47 N. E. 292; In re Seaman's Estate, 147 N. Y. 69, 41 N. E. 401; Inheritance Tax (Gleason & Otis), 90, 91. It is this well-recognized principle that distinguishes the case at bar from that of Hunt v. Wicht, 174 Cal. 205, 162 Pac. 639, L. R. A. 1917C, 961.".

Nickel v. State, 43 Nev. 12, 48, 185 Pac. 565, 566, column 2, middle (1919).

Note may here be made of *State Street Trust Company v. Stevens,* 209 Mass. 373, another Massachusetts case cited by the Nevada court. The case involved a transfer tax laid by the Massachusetts acts of 1907 and 1909 upon a written transfer in trust fully executed and delivered January 19, 1910. *The taxing law was therefore in force when the transfer occurred.* The court sustained the tax, holding that the written transfers in trust fell within the statute taxing transfers intended to take effect, etc., after the death of the grantor, and furthermore that the transfer was not made for full consideration. These were the only points involved, and the case therefore does not turn upon the question with which we are here concerned.

It appears therefore, that the Nevada court has held, and the Massachusetts court has stated in a case in which a consideration of the point was in no way necessary to the decision, that the liability for the tax does not arise until possession or enjoyment accrues. This interpretation is opposed to the great weight of authority, and may be accounted for, in whole or in part by the fact that there is no provision in the Nevada and Massachusetts acts imposing a lien at the moment of transfer of title. In any event, the only question involved in this point is one of statutory construction.

III.

It is not certain whether the holding of the Supreme Court of Nevada dealt with in the immediately preceding point is referable to the views of that court dealt with in Point I, i. e., that the transfer of title was incomplete until death, or whether the court treated the act as laying a tax upon the coming into possession of future interests. It is likely that the decision rests upon the former rather than upon the latter ground, because a tax upon coming into possession is a direct tax upon property and not a transfer tax, and if the act were construed as imposing such a tax, it would violate the Constitution of Nevada providing (1) that "the legislature shall provide by law for a uniform and equal rate of assessment and taxation," and (2) that the subject of each law "shall be briefly expressed in the title."

In its decision the Supreme Court of Nevada clearly held that the statute laid a transfer tax, and that transfers which were complete were not affected thereby,

but it held that the transfer under review was not complete; and, finally, upon rehearing, it held that in transfers of future interests dependent upon a reserved life estate in the grantor, no liability for the tax arises until the remaindermen come into possession and enjoyment of the future interests. This, we think, was merely intended to establish a general rule that until the grantor's death the transfer was incomplete within the meaning of the Nevada statute.

This view is strengthened by the circumstance that if the Nevada court had intended to rest its decision upon the validity of the tax as one laid upon the coming into possession, it would have had to consider the fact that such a tax is a direct tax upon property. (*Matter of Pell*, 171 N. Y. 48, 63 N. E. 787 (1902), which reverses the same case reported in 60 App. Div. 236, 286, 70 N. Y. S., 196 (1901). The Nevada court would, furthermore, have been called upon to consider whether a direct tax upon property could constitutionally be laid upon an ascending scale based upon relationship to the former owner and the amount involved, and also to consider that the title of the act described the law as one imposing a transfer tax and not a direct tax upon property.

IV.

Moffitt v. Kelly, 218 U. S. 400 (1910), holds that the decision of the highest court of a state upholding the validity of a state tax is not reviewable in this court if there be nothing in the Constitution of the United States which denies to the state the abstract power to lay such a tax; and this decision is equally applicable, whether we regard the decision of the Supreme Court of Nevada as based upon the incomplete transfer idea, or upon the coming into possession idea.

> "As there was state power to tax, so far as the Constitution of the United States was concerned, the question whether . . . [the thing taxed] was correctly subjected to the tax, was purely a state question, not involving any violation of the Constitution of the United States, and which, therefore, we have no right to review."
>
> *Moffitt v. Kelly*, 218 U. S. 400, 405.

> "We have nothing to do with the supposed limitations upon the power of the state legislature in the Constitution of the state. Those can be taken to be disposed of by the decisions of the state court."
>
> *Ft. Smith Co. v. State*, 251 U. S. 532.

In the consideration of this point we are not unmindful of the fact that if the decision of the Supreme Court of Nevada is to be treated as one laying a direct tax upon property, such a ruling would result in a property tax not dependent upon value alone, but varying with relationship and the amount involved; and that such a tax might produce an inequality forbidden by the Constitution of the United States. In *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, Mr. Justice Brewer, in dealing with the validity of transfer

taxation upon an ascending scale, said in the course of his dissenting opinion:

> "It seems to be conceded that if this were a tax upon property such increase in the rate of taxation could not be sustained." (170 U. S. 302.)

V.

If we assume, however, that the cases at bar are not to be disposed of upon the considerations already stated, it will be in order briefly to enumerate the propositions of general jurisprudence upon which the Supreme Court of Nevada rested its conclusion that there had been an incomplete transfer of title at the time the statute took effect, and that the transfer was, therefore, taxable under that statute, with a view to discovering whether these propositions as applied to the facts of this case are so wholly unsubstantial or lacking in color of merit as to be laid aside in the consideration of the case.

It is difficult to determine the precise proposition or propositions upon which the decision of the Supreme Court of Nevada is made to rest, or whether it was intended by the second decision to withdraw or qualify any announcement of the first decision. We shall deal, therefore, with the judgment of that court on the basis that its decision rests upon all of the propositions discussed by it in its two opinions, and shall briefly consider each of the grounds of decision.

(a) The transfer of April 17, 1913, did not take effect as a transfer of the equitable interests in remainder until the death of the grantor, October 14, 1916.

The determination of this question rests solely upon the construction of the instrument of transfer.

It may be noted that the grant provided, after making provision for the disposition of the income during the grantor's life, that at his death the trustees should "take and hold" the property and administer and dispose of it as directed for the benefit of the remaindermen.

The first opinion of the Nevada court lays particular emphasis upon "the expressed limitation in the deed that, upon and after the death of the grantor, the trustees shall take and hold all of said property" (43 Nev. 29).

We do not discuss the construction of the grant or attempt to fix the time when the equitable interests vested in the remaindermen (see *Carter v. Bugbee, supra*, p. 4); but point out only the non-federal nature of this basis of decision. In questions involving the construction and effect of a conveyance between private parties, this court follows the decision of the state court. *(East Central Eureka Mining Co. v. Central Co.,* 204 U. S. 266, 272.)

(b) The date of the grantor's death is to be deemed the effective date of transfer of title upon the ground that the grantor reserved the income for life, and a power of revocation, and could by testamentary disposition have defeated the rights of the beneficiaries.

It has been held in cases in which a grantor has reserved to himself practically all of the incidents of ownership of the property transferred, and power to exercise control over it until his death, that not alone are possession and enjoyment postponed, but title itself

cannot be deemed to have passed until the grantor's death.

Bullen v. Wisconsin, 240 U. S. 625, 630;
Matter of Dana, 215 N. Y. 461, 109 N. E. 557.

The Nevada court has stated among its reasons for taxing the transfer that the grantor reserved the income for life, that he had power to revoke the trust, and that he could by will have secured the property to others than the beneficiaries named in the trust deed. We do not stop to consider whether any reservation was made by the grantor other than the life income, but mention this second ground of decision, not as evidence of the correctness or incorrectness of the Nevada court's ruling, but as showing the non-federal nature of this ground of decision.

(c) The transfer is liable to the tax upon the ground that it was made with intent to evade transfer taxation.

The transfer having been made eight days before the Nevada statute went into effect and two months before a new California statute was passed, whereby the rates of taxation in that state were doubled, it is suggested in the Nevada court's decision that the transfer should be taxable as one made with intent to evade transfer taxation.

In this connection we quote the following from *Bullen v. Wisconsin*, 240 U. S. 625, 630:

> "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side, is none the worse legally than a party who has availed himself to the

full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law."

See also, *State v. Probate Court,* 102 Minn. 268, 113 N. W. 888, wherein it is said:

"It is possible that David Tozer and the members of his family at the time of these transactions may have had the possibilities of an inheritance tax in mind; but the law which the state is now attempting to apply was not then in force, and was not enacted until two years and more thereafter. The case, therefore, does not present the question of the effect of a transfer of property with the intention and for the purpose of avoiding the operation of an existing inheritance tax law."

Weeks v. Sibley, 269 Fed. 155, 159, contains the following:

"The right to change the status of an organization, or to dissolve an organization in any legal manner, is not made ineffectual because the motive impelling the change is to reduce or avoid taxation in the future. The right so to do is an incidental right, inseparably connected with an individual's right to own and control his property. It is practically identical with the sale by a citizen of tax-burdened securities and the investment of the proceeds thereof in tax-exempt ones, for the purpose of reducing or avoiding taxation.

It is not unnatural that any thoughtful business man take such steps. It is altogether different from tax dodging, the hiding of taxable property, or the doing of some unlawful or illegal thing in order to avoid taxation."

(d) Although the Nevada act provided that it was not to take effect until thirty days from the date of its passage, the legislature intended that no tax-free transfers should be made after the passage of the act.

The first opinion of the Nevada court contains the following sentence:

> "Conceding that the law did not become effective until 30 days after its enactment, we are of the opinion that in this, as in other cases, the Legislature deemed it best to give notice to the public of its provisions for this period of time before it became effective, and the interval of time was not intended to afford ingenious minds an opportunity to devise schemes to defeat the purpose of the act." (43 Nev. 31.)

It is undoubted that the act could have been made to take effect immediately it was passed. The above sentence indicates that the Supreme Court of Nevada with this in mind, sought to apply the act prospectively to the transfer made between passage and effective date, by holding that the legislature intended that no tax-free transfers should be made after the passage of the act.

VI.

Even though the nonfederal grounds of the Nevada decision were disregarded, and Moffitt v. Kelly were held not to apply, it would still be necessary to show that there was a federal question in the case; and we now consider the theories upon which it may be argued that a federal question exists.

If the plaintiffs in error satisfy the court (a) that the nonfederal questions must be laid aside as wholly

without substance and altogether wanting in color of merit, and (b) that the case is not controlled by *Moffitt v. Kelly*, 218 U. S. 400, it remains for them to show that there is a federal question in the case. The following contentions might present a federal question:

1. If the decision of the Supreme Court of Nevada construes the statute as one laying a tax upon the coming into possession, then as we have heretofore suggested, the act has been construed as one laying a direct tax upon property, although the amount of the tax does not depend upon value alone, but varies with relationship and the amount involved, computed on any ascending scale. This, we have suggested, violates the equality requisite under the Constitution of the United States (*supra*, p. 13). This point would justify the suing out of the writ of error.

2. Another point which might be made to raise a federal question would be the contention that the Supreme Court of Nevada by its judgment deprived the plaintiffs in error of property without due process of law, by itself imposing a tax when there was no statute in force laying the tax. It might be argued that *Scott v. McNeal*, 154 U. S. 34, afforded analogy for such a contention. In that case it was held that administration granted for a live man as dead is not due process as to him, and is void, on the ground that there was no law in force giving the probate court jurisdiction to enter a decree under such circumstances.

This second contention is not reviewable upon writ of error, but might be reviewed upon writ of certiorari.

[See *Bullock v. State*, 41 Sup. Ct. 193 (Jan. 17, 1921), a recent case in which writ of error was dismissed, writ of certiorari granted, and the questions involved determined on their merits.]

It will be noted that the cases at bar involve a controversy between a sovereign state on the one hand and citizens of the United States on the other, and that the action of the tribunals of a state is subject to the limitations which this court defined in *Chicago Company v. Chicago*, 166 U. S. 226, 232, 234. This was a suit between a citizen of the United States and one of the political subdivisions of a state, and in speaking of the 14th Amendment, this court said:

> "But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state'. This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'."

Bullock v. State, supra, turned upon the question whether a state was bound by a decree in a foreclosure suit in which the state had voluntarily intervened. The state court held that the state was not bound. This court said:

> "As the State voluntarily made itself a party . . . it might seem that the State ought to be

bound in a way that otherwise it would not be. But if in a revisory proceeding the higher State Court says that the State should not be bound and that the decree was wrong in this particular, that is a local question with which we have nothing to do. The result is that although the State Court may have acted on questionable or erroneous postulates there is nothing in its action that calls for a reversal of its judgment."

VII.

Summary and Conclusion.

We respectfully submit that the only questions in this case are (a) whether the nonfederal grounds are sufficient to sustain the decision of the Supreme Court of Nevada, (b) whether *Moffitt v. Kelly* controls the case, and (c) whether any federal right has been invaded.

San Francisco, March, 1921.

GARRET W. MCENERNEY,
Amicus Curiae.

NICKEL ET AL., AS TRUSTEES, &c., ET AL. *v.* COLE, AS STATE CONTROLLER OF THE STATE OF NEVADA.

NICKEL ET AL., AS TRUSTEES, &c., ET AL. *v.* STATE OF NEVADA.

ERROR TO THE SUPREME COURT OF THE STATE OF NEVADA.

Nos. 268, 269. Argued March 24, 1921.—Decided April 25, 1921.

1. Remainder interests which vested after a state transfer tax law was approved but before the time when, as construed by the state Supreme Court, it became effective, but which nevertheless were

subjected to it by that court upon the theory that the vesting actually occurred after it became effective, are not to be regarded as taxed thereby in violation of the Fourteenth Amendment, (even assuming that such a tax may not be laid retroactively), since the law might have been made applicable before the interests vested. P. 224.

2. A decision of a state court made upon grounds having no relation to any federal question and without purpose to evade a federal issue, will be accepted by this court, whether right or wrong, when the case comes here for review. P. 225.

43 Nevada, 12, affirmed; petition for writ of certiorari denied.

ERROR to review judgments of the Supreme Court of Nevada sustaining taxes laid under the state transfer tax act upon remainder interests claimed to have vested before the effective date of the statute. The facts are stated in the opinion.

Mr. Edward F. Treadwell, with whom *Mr. Azro E. Cheney* was on the brief, for plaintiffs in error.

Mr. Leonard B. Fowler, Attorney General of the State of Nevada, with whom *Mr. Robert Richards* and *Mr. Wm. C. Prentiss* were on the brief, for defendants in error.

Mr. Garret W. McEnerney, by leave of court, filed a brief as *amicus curiæ*.

MR. JUSTICE HOLMES delivered the opinion of the court.

The first of these suits was brought by the Controller of Nevada to collect a transfer tax alleged to be due under a statute of Nevada approved on March 26, 1913, to take effect thirty days from that date. Nevada Stats. of 1913, c. 266, p. 411. The second suit was brought to quiet title to the shares of stock in respect of which the tax was assessed—to establish that there was no lien upon or claim against them for the tax. The two cases were

heard together in the state courts and here upon the same facts. The Supreme Court of Nevada held that the tax was due and decided in favor of the State. The parties on the other side had set up and claimed immunity under the Constitution of the United States, especially the Fourteenth Amendment, and brought the cases here by writ of error. By way of caution they also filed a petition for certiorari which has not yet been passed upon by this Court.

The facts are these: Henry Miller, a resident of California, was the owner of 119,875.75 shares of the stock of Miller & Lux, Incorporated, a Nevada corporation. Miller & Lux, Inc., owned the stock of the Pacific Live Stock Company, a California corporation, and the latter owned real estate and personal property in Nevada appraised at $1,431,326.86. On April 17, 1913, after the above mentioned statute had been passed but before it went into operation, Miller in California made a will, and at the same time a deed of trust conveying his stock to the plaintiffs in error, in trust for himself for life and after his death upon limitations similar to those in his will—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. The deed contained no power of revocation. The stock was endorsed and delivered to the trustees and thereafter was retained by them. Miller died on October 14, 1916. The statute imposes a tax upon the transfer of all property which shall pass in trust or otherwise by will or by statutes of inheritance or by deed or gift made without valuable and adequate consideration in contemplation of the death of the grantor or donor, or to take effect in possession or enjoyment at or after such death.

The plaintiffs in error admit that if the statute had been in operation at the time of the transfer the tax would have been due, so that it is not necessary to go into further particulars about the act. But they say that the

interest of the remaindermen after the death of Miller vested upon the execution of the deed and that therefore the statute did not apply to them, and could not do so consistently with the Constitution of the United States.

We shall not discuss the postulate of the argument for the plaintiffs in error—the notion that a tax upon transfers imposed by a statute passed after the transfers had taken place would be void. In this case the statute was passed before the date of the deed of trust and therefore undeniably could have been drawn so as to tax the transaction. Reading as it did it possibly might have been construed as doing so, notwithstanding the postponement of the date for its going into operation, and so construed would have been good as against constitutional objections.

But the plaintiffs in error say that what we pronounce possible is not what the Supreme Court of Nevada did. The Supreme Court of Nevada seems to have conceded that if the interest of those who took upon Miller's death was vested when the deed was delivered the statute did not and perhaps could not apply. They reached the result by holding that the execution of the deed and will was one transaction and gave no vested right until Miller's death. Thereupon the plaintiffs in error say that the above limitation to the statute being admitted the State Court could not avoid the supposed constitutional difficulty by assuming a view of the instrument that is deemed to be plainly untenable, as held by the Chief Justice dissenting, and contrary to the law of California where the parties lived and the transfer was made. *Nickel* v. *State*, 179 California, 126. But the answer to this is that when as here there can be no pretence that the Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. *Enterprise*

Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 164. And when, as here, the statute unquestionably might have made the tax applicable to this transfer, we do not inquire very curiously into the reasoning by which the statute is held to justify the tax. "As there was state power to tax . . . the question whether or not the interest [of the plaintiffs in error] under the circumstances was correctly subjected to the tax was a purely state question." *Moffitt* v. *Kelly*, 218 U. S. 400, 405. The plaintiffs in error contend that this Court is "concerned . . . solely with the effect and operation of the law as put in force by the State." *Corn Products Refining Co.* v. *Eddy*, 249 U. S. 427, 432. The operation of the law if construed to cover this case infringes no constitutional rights.

Judgments affirmed.
Writs of Certiorari denied.

MR. JUSTICE MCKENNA dissents.

MR. JUSTICE CLARKE took no part in the decision of this case.